Supreme Court, U.S.
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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1993

HIGHLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, H.F.S. CORPORATION, BEN KARMELICH AND SELINA ELIZABETH ("BETTY") PRATT,
*Petitioners,*
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, BY THE CITY OF LOS ANGELES, et al.,
*Respondents.*

**Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented by the instant petition is whether, by virtue of 12 U.S.C. § 1464, *et seq.* and 12 C.F.R. §§ 545.1 and 545.2, and given the decision of this Court in *Fidelity Federal Savings & Loan Ass'n v. de la Questa*, 458 U.S. 141 102 S.Ct. 3014 (1982), federal law preempts state law pertaining to the lending operations and ancillary activities of federal savings and loan associations notwithstanding the absence of a federal regulation dealing specifically with the area of state law affected?

Should a writ of *certiorari* issue to review the question set forth above, review is also requested with respect to the following questions arising under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.* ("RICO"):

1. Is it necessary, as held in *Holmes v. Securities Investor Protection Corp.*, ____ U.S. ____, 112 S.Ct. 1311 (1992), in order to state a cause of action under RICO for the complaint to plead facts showing that the alleged injury was the proximate result of the racketeering activity?

2. Is it necessary, as held in *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524 (1981), in order to allege a cause of action under RICO to plead fact showing the existence of an "association-in-fact enterprise" that functions as a continuing unit separate and apart from the alleged pattern of racketeering activity?[1]

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[1]The Defendants and Respondents in the proceedings below were Highland Federal Savings and Loan Association, now known as Highland Federal Bank, F.S.B. ("Highland"); H.F.S. Corporation ("H.F.S."), Ben Karmelich ("Karmelich"), and Selina Elizabeth ("Betty") Pratt ("Pratt").

The Plaintiffs and Appellants in the proceedings below were the People of the State of California, acting by and through the City Attorney of the City of Los Angeles, and a putative class of alleged current or former tenants of eleven apartment buildings. The individual named plaintiffs and purported class representatives are Haydee Alcantara, Indira Alcantara, Angel Edgardo Flores, Raudel Flores, Maria Melgar, Yessica Melgar, Jose Velasquez, Yovani Velasquez, Raul Cruz Amaya, Alexander Corea Amaya, Margarita Bonilla, Jova Corea, Alexander Corea Amaya, Margarita Espinoza, George Michael Espinoza, Javier Espinoza, Yesenia Raquel Espinoza, Daniel Alejandro Bonilla, Tricia Bonilla, Josefina Sepulveda, Maria DeJesus Rodriguez, Gaudalupe Ibarra, Betty Rodriguez, Esiquio Rodriguez, Gloria Escobar, Ana Arellano, Antonia Arellano, Cindy Arellano, Eduardo Arellano, Mayra Arellano, Steve Arellano, Manuel Gil, Amalia Mendoza, Angelica Gil Mendoza, Yesehia Isabel Gil Mendoza, Yolanda Gil Mendoza, Concepcion Reyes, Patricia Reyes, Jose Roberto Reyes, Ramon Campos, Roman Campos, Concepcion Garcia, Ana Maria Campos, Concepcion Campos, Maria Campos, Raul Campos, Veronica Campos, Trinidad Garcia, Karen Rojas, Maria Garcia, Raul Garcia, Josefina Rivera, Salvador Rivera, Jr., Manuel Rivera, Salvador Rivera, Leticia Ruiz, Rosa Cordova, Claudia Beatriz Cortez, Jose Santos Nevarez, Rosa Estela Nevarez, Juan Jose Nevarez, Carlos F. Nevarez, Claudia Alejandra Barragan, Gabriel Barragan, Amalia Delgado, Jorge Flores, Luz Inez Ruiz, Rafael Valtierra, Gregorio Rojas, Freddie Rojas, Gregorio Rojas, Jr. Marcela Rojas, Maria Rojas, Gregoria Rojos, Daisy Villalobos, Avina B. Esperanza, Carlos Rivas, and Maria De La Luz Almaraz.

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*Petitioners,*
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, BY THE CITY OF LOS ANGELES, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioners hereby petition this Court for a Writ of Certiorari to the Court of Appeal to review the decision of the Court of Appeal of the State of California described below.

## OPINION BELOW

The opinion of the Court of Appeal, originally unpublished but ordered published by the California Supreme Court, appears at 14 Cal.App.4th 1692. It and the remittitur notice based upon that opinion issued June 8, 1993, are reproduced in Appendices "B" and "E".

## JURISDICTION

Review is sought of the decison of the Court of Appeal of the State of California filed January 26, 1993, reversing a judgment of

dismissal of the Los Angeles County Superior Court entered on March 15, 1991.

The Court of Appeal for the State of California denied rehearing on February 25, 1993. A copy of the order denying rehearing is reproduced in Appendix "C".

The Supreme Court for the State of California denied discretionary review of the decision on April 22, 1993. A copy of the order denying discretionary review appears at 93 Daily Journal DAR 5103 (April 22, 1993), and is reproduced in Appendix "D".

The jurisdiction of this Court to review the decision of the Court of Appeal of the State of California by writ of certiorari is invoked pursuant to 28 U.S.C. § 1257(a), which provides:

> "Final judgments or decrees, rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." Accordingly, for granting *certiorari* pursuant to 28 U.S.C. § 1257:
>
> 1. There must be a final judgment or decree;
>
> 2. The final judgment or decree must be "rendered by the highest court of a State in which a decision could be had"; and
>
> 3. A title, right, privilege or immunity must be specially set up or claimed under the Constitution or statutes of the United States.

In addition, Rule 13 of the Supreme Court Rules provides that "[a] petition for writ of certiorari, seeking review of a lower state court judgement which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review."

Each of the requirements prescribed by § 1257(a) and Rule 13 is satisfied in the case at bar.

**a. Finality.**

A judgment or decree may be deemed "final" for purposes of § 1257, notwithstanding the fact that it is not the last possible judgment or decree in the action and that further proceedings remain to be conducted. Rather, a state court judgment or decree is deemed final notwithstanding the pendency of further proceedings when the federal issue has been finally decided in the state court and the party seeking review might prevail on nonfederal grounds, thereby rendering review of the federal issue unnecessary. As this Court explained in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975):

> *"Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a [f]inal judgment or decree.* Title 28 U.S.C. § 1257 retains this limitation on our power to review cases coming from state courts. The Court has noted that "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final-judgment rule to preclude review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945). *But the Court there observed that the rule had not been administered in such a mechanical fashion and that there were circumstances in which there has been 'a departure from this requirement of finality for federal appellate jurisdiction'* . . . .
>
> "These circumstances were said to be 'very few', . . . but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a Particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting

the completion of the additional proceedings anticipated in the lower state courts.

> *"... there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation."* (420 U.S. 478-484; emphasis added.)

Accord: *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 179-180, 108 S.Ct. 1704 (1988) [proper to review state preemption decision even though further state court proceedings are pending when "unreviewed decision ... might seriously erode federal policy in the area of nuclear production"].

In the instant case, the federal issue in question has been finally determined; and, while proceedings are pending in the trial court with respect to the various causes of action based upon state laws that the petitioners contend are preempted, should the petitioners prevail on those causes of action on nonfederal grounds, any further review of the federal issue would be unnecessary.

Moreover, failure to review the Court of Appeal decision could seriously erode federal policy. For more than half a century, it has been the policy of the federal government to permit the Federal Home Loan Bank Board ("the Bank Board"), and now the Office of Thrift Supervision ("OTS"), to preempt, through the promulgation of regulations, state laws affecting the operations of federally chartered savings associations. The decision of which review

is sought obviously militates strongly against the accomplishment of that objective.

**b. Judgment Of The Highest Court Of The State In Which A Decision Could Be Had.**

A judgment or decree is deemed to have been rendered by the highest court of the state in which a decision could be had even though it is rendered by an intermediate appellate court when review by the highest court is discretionary and a timely application for such discretionary review is made and denied. *Calder v. Jones,* 465 U.S. 783, 786, 104 S.Ct. 1482, 1485 (1984).

In the instant case, while the decision of which review is sought is that of an intermediate appellate court, review by the highest court of the state is discretionary and a timely application for such review was made and denied.

**c. Judgment Involves A Title, Right, Privilege Or Immunity Specially Set Up Or Claimed Under The Statutes Of The United States.**

As previously set forth, this Court has jurisdiction to issue a writ of certiorari when the judgment or decree of the lower court involves a title, right, privilege or immunity specially set up or claimed under the Constitution or statutes of the United States.

In the instant case, petitioners set up an immunity to California state law under the Supremacy Clause of the Constitution and a statute of the United States, 12 U.S.C. § 1464(a). Hence this requirement is clearly satisfied.

**d. Timeliness.**

The order denying discretionary review by the California Supreme Court was entered April 22, 1993, and this petition is filed within ninety days of that date.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions, statutes and administrative regulations implicated by the question presented are the Supremacy

Clause of the United States Constitution (Article VI, clause 2), 12 U.S.C. § 1464(a), and 12 C.F.R. §§ 545.1 and 545.2. They are each reproduced in Appendix "A".

The statute implicated by the RICO questions of which review is sought should certiorari be granted is 12 U.S.C. § 1961. It is reproduced in Appendix "A".

## STATEMENT OF THE CASE

### A. The Parties.

On March 28, 1989, the City Attorney of the City of Los Angeles, acting under the authority of California Civil Code § 17200, *et seq.*, on behalf of the People of the State of California ("the People"), and certain alleged present or former tenants (collectively, "the tenants") of eleven residential apartment buildings ("the subject buildings"), acting on their own behalf and on behalf of an alleged class of present and former tenants, brought an action, *The People of the State of California. et al. v. Highland Federal Savings and Loan Association, et al.*, L.A.S.C. Case No. C718828 ("the action below"), against, among others, Highland, H.F.S., a subsidiary of Highland, and two officers of Highland, Mr. Karmelich and Ms. Pratt. (C.T., Vol. I, p. 2.)[2]

### B. The Complaint.

The original complaint in the action below comprised approximately one hundred pages and contained a total of one thousand one hundred and thirty-six alleged causes of action, including causes of action for fraud, predicated upon more than a dozen legal theories. (C.T., Vol. I, p. 6, ln. 25 - p. 7, ln. 11.)

Shortly after the original complaint was filed, the People and the tenants filed a first amended complaint. The alleged causes of action set forth in the first amended complaint were, as in the

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[2]Highland, H.F.S., Mr. Karmelich, and Ms. Pratt are sometimes referred to collectively as "the Highland defendants". The Highland defendants are the only defendants named in the action below that are parties to the appeal out of which the instant proceeding arises.

original complaint, predicated upon more than a dozen legal theories, most of them based on California state law but some of them based on RICO. (C.T., Vol. I, p. 320, ln. 17 - p. 336, ln. 24.)

The Highland defendants generally demurred to the first amended complaint for failure to state a claim upon which relief could be granted (C.T., Vol. II, p. 576, ln. 8 - p. 577, ln. 20); the demurrer was sustained, with leave to amend (C.T. Vol. V, pp. 1825-1828); and, in due course, the People and the tenants filed their second amended complaint.

The gravamen of the second amended complaint — which extended to almost one hundred-and-ninety pages, contained one thousand and fifty-two alleged causes of action, and was divided into thirty-eight major sections — was, as it pertained to the Highland defendants, that they allegedly were engaged in lending practices relating to the subject properties which were "outside the normal and standard practices of lenders". (C.T., Vol. V., p. 1841, lns. 18-19.)

In particular, the second amended complaint alleged, *inter alia*, that Highland, through its loan practices and activities ancillary thereto, including making loans to uncreditworthy borrowers, making loans to persons using fictitious names, making loans in violation of prudent loan underwriting practices, transferring defaulted loans to "shell corporations", extracting excessive loan fees and interest charges, and failing to exercise contractual rights against borrowers when entitled to do so, rendered it financially infeasible for the owners to keep the subject buildings in good repair and thus caused or perpetuated the disrepair from which they suffered and made it possible for the owners to frustrate efforts by the City and the tenants to bring the subject buildings into good repair. (C.T., Vol. V, p. 1863, ln. 11-p. 1864, ln. 16; Vol. VI, p. 1962, ln. 14 - p. 1964, l.18.)[3]

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[3]The complaint also alleged (a) that the Highland defendants controlled and/or conspired with the owners of record for the purpose of maximizing earnings by avoiding the expense of repairs required by habitability laws at the same time as they collected rents legally chargeable for units that complied with such laws and (b) that the

With respect to RICO, the second amended complaint purported to allege violations of 18 U.S.C. §§ 1962(c) and (d).

In particular, plaintiffs alleged that the Highland defendants, and other defendants, participated in the conduct of one or more "enterprises" through a "pattern of racketeering activity," in the form of various acts of mail and wire fraud. The alleged "enterprises" included the "association in fact" of Highland, HFS, and another defendant, Northeast Investment Corporation, as well as other groups of defendants. (C.T., Vol. VI, p. 1988, lns. 211.) The purported mail fraud was alleged to include the mailings of various documents related to the subject buildings, while the purported wire fraud similarly consisted of unspecified alleged telephone conversations related to the subject buildings, and these mailings and telephone conversations were alleged to have been undertaken in furtherance of the "scheme" to conceal the alleged true or beneficial owners of the subject buildings. No specific facts constituting such mail fraud were, however, alleged. (C.T., Vol. VI, p. 1988, ln. 19 - p. 1989, ln. 15.)

### C. The Demurrers And Judgment.

The Highland defendants generally demurred to the second amended complaint for failure to allege facts sufficient to state a cause of action against them either (a) under state law, on the ground (among others) that the state laws at issue were preempted by 12 U.S.C. § 1464(a) and regulations promulgated thereunder, or (b) under RICO. (C.T., Vol. VI, pp. 2134-2135, ln. 9.) The trial court sustained the demurrers, without leave to amend, and judgment was entered in favor of the Highland defendants and against the People and the tenants. (C.T., Vol. IX, pp. 3405-3408.) It is from this judgment that the People and the tenants appealed.[4]

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Highland defendants perpetrated a fraud upon the tenants by falsely representing that they would receive an apartment complying with state and local habitability laws.

[4]Although, as a technical matter, a demurrer assumes the truth of the allegations of the complaint to which it is addressed, the Highland defendants desire to state, for the record, that the allegations of wrong-

**D. The Judgment Of The Court Of Appeal.**

On January 26, 1993, the Court of Appeal rendered its judgment in the within appeal.

With respect to the preemption issue, the Court of Appeal determined as follows:

1. For 12 U.S.C. § 1464, *et seq.* and regulations promulgated thereunder to preempt state law, there must be a regulation dealing specifically with the area of state law in question.

2. The following federal regulations do *not* — despite their language — operate to preempt state law with respect to the lending operations of federal associations:

"§ 545.1 General authority.

"*A federal savings association may exercise all authority granted to it by . . . Home Owners Loan Act of 1933 . . . and 12 U.S.C. 1464 . . . and its charter and bylaws, whether or not implemented specifically by . . . Office [of Thrift Supervision] regulations*, subject to the limitations and interpretations contained in this part."

"545.2 Federal preemption.

"The regulations in this Part 545 are promulgated pursuant to the *plenary* and *exclusive authority of the Office [of Thrift Supervision] to regulate all aspects of the operations of Federal savings associations*, as set forth in section 5(a) of the [Home Owners' Loan] Act [of 1933, 12 U.S.C. 1464, as amended]. *This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.*" (Emphasis added.)

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doing made against them in the second amended complaint are false; and that the Highland defendants have not, in respects here relevant, engaged in wrongful conduct.

3. With minor exceptions, there are no federal regulations dealing with the specific subjects with which the complaint in the action below was concerned.[5]

With respect to RICO, the Court of Appeal determined as follows:

1. It was sufficient for purposes of RICO that the complaint alleged an association among the defendants and "an ongoing series of business transactions among these various defendants with regard to each of the subject buildings."

2. Each tenant plaintiff's deprivation of a habitable dwelling was an injury which "flowed directly from the racketeering activity committed by defendants."

Accordingly, the Court of Appeal reversed the determination of the trial court (a) that federal law preempted the causes of action in the complaint predicated upon state law; and (b) that the complaint failed to state a cause of action for relief under RICO. It also reversed the determination that the complaint failed to state a cause of action for fraud under California law.

A remittitur notice, reversing the judgment of the trial court and remanding with directions, was issued on June 8, 1993.

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[5]The Court of Appeal found preemption in two areas:

1. It found that "the allegation that Highland charged loan 'points and provided interest, each of which was higher than the rates for bona fide loan [ ] transactions' impinges on the specific intent of congress to preempt state usury law . . . and thus, improperly delves into an area preempted by HOLA"; and

2. It found that the portion of the prayer of the complaint "which seeks to enjoin the Highland defendants from '[d]eclining to initiate and complete foreclosure as speedily as the law permits on substandard conditions are not fully corrected within 120 days . . .' is in direct conflict with 12 C.F.R. section 545.34 which permits a federal association 'at its option [to] declare immediately due and payable the secured indebtedness upon an unconsented to transfer of title to the real property.' "

### E. The Denial Of Discretionary Review By The California Supreme Court.

Under Rule 28 of the California Rules of Court, the California Supreme Court has discretionary authority to review decisions of intermediate California appellate courts, including the Court of Appeal of the State of California for the Second Appellate District.

Accordingly, on March 8, 1993, the Highland defendants filed in the California Supreme Court a timely petition for discretionary review of the Court of Appeal decision. On April 22, 1993, the petition for review was denied.[6]

## REASONS FOR GRANTING THE WRIT

### A. Resolution Of The Question Presented By This Court Is Necessary To Secure Uniformity Of Decision With Respect To The Preemption Of State Laws Under HOLA And Regulations Promulgated Thereunder.

#### 1. The History And Purpose Of HOLA.

Congress authorized the creation of the federal savings and loan system in 1933, through the enactment of the Home Owners' Loan Act ("HOLA"). HOLA does a variety of things. It authorizes federal associations to engage in specified activities, including making loans secured by residential real estate; it prohibits federal associations from engaging in certain activities; and, subject to the aforementioned statutory empowerments and restrictions, it delegates to a federal agency, originally the Bank

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[6]While the petition for review was denied, the California Supreme Court did order the decision of the Court of Appeal published in the official reports pursuant to Rule 976 of the California Rules of Court. *The effect of that order was to give the decision citable precedential significance.*

Board and currently the OTS, plenary authority over the operations of federal associations:

> "In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director [of OTS] is authorized, *under such rules and regulations as the Director may prescribe . . . to provide for the organization, incorporation, examination, operation and regulation of* associations to be known as Federal savings associations, . . . *giving primary consideration to the best practices of thrift institutions in the United States . . .*" (12 U.S.C. § 1464(a); emphasis added.)

The congressional purpose in creating the federal savings and loan system, investing it with its powers, and delegating to the Bank Board [now OTS] plenary regulatory authority over its operations, was to create a system of financial institutions that would be immune from the potentially pernicious effects of state law. As explained in *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256 (9th Cir. 1979):

> "The Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461 *et seq.* (HOLA), *was the result of Congressional dissatisfaction with state law and practice* on the financing of home construction. The first federal effort was through the Home Loan Bank Act of 1932. This failed to attack the problem satisfactorily. By 1933, 40 percent of all home loans in the United States were in default.
>
> * * *
>
> "The result was HOLA, *a radical and comprehensive response to the inadequacies of the existing state systems.* A *federal* savings and loan system was created. The Federal Home Loan Bank Board [the Bank Board] was created *with extremely broad powers to promulgate rules and regulations.*
>
> * * *
>
> "With reference to HOLA, one writer has stated:
>
> '. . . the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that . . . [the Bank Board] *rules would set an example for*

*uniform and sound savings and loan regulations.*' T. Marvell, *The Federal Home Loan Bank Board*, p. 26 (1969).

"Pursuant to its authority, *the Bank Board has promulgated regulations comprehensively dealing with the creation and operation of federal savings and loan associations . . . .*" (604 F.2d 1257-58; some emphasis added.)

**2. The Change In Regulatory Approach.**

At one time, the Bank Board promulgated regulations authorizing federal associations to engage in particular activities; and, as a consequence, there were numerous HOLA regulations dealing with a wide variety of subjects. In 1983, however, the Bank Board changed its approach. Instead of promulgating numerous specific regulations authorizing particular activities, it promulgated a regulation, 12 C.F.R. § 545.1, which, as previously indicated, *authorizes federal associations to exercise all authority granted to them by HOLA, whether or not that authority has been specifically implemented by regulation, thereby occupying the entire field of regulatory authority over the operations of federal associations conferred upon the Bank Board [now OTS] by HOLA itself:*

"A federal savings association may exercise all authority granted to it by . . . [HOLA] . . . and its charter and bylaws, whether or not implemented specifically by . . . [OTS] regulations, subject to the limitations and interpretations contained in this part."

While the Bank Board [now OTS] continues to promulgate certain specific regulations dealing with the activities of federal associations, *these specific regulations are, for the most part, merely restrictions upon the board grant of authority contained in § 545.1.* As explained in the preamble to Part 545 of Title 12 of the Code of Federal Regulations:

"Part 545 now addresses the authority of associations only to limit, interpret or recognize incidental authority. *Federal associations may exercise all of the authority granted by*

> *HOLA subject only to limitations contained in the regulations.*" (48 Fed.Reg. 23,032 (1983); emphasis added.)

Moreover, and as previously noted, the Bank Board [now OTS] has expressly stated that such regulations are promulgated pursuant to its plenary and exclusive authority to regulate the operations of federal associations *and are intended to preempt any state laws purporting to address the subject of the operations of federal associations:*

> "The regulations in this Part 545 are promulgated pursuant to the *plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations*, as set forth in section 5(a) of the [Home Owners' Loan] Act [of 1933, 12 U.S.C. § 1464, as amended]. *This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.*" (Emphasis added.)

**3. The Decision Of The Court Of Appeal Is Inconsistent With The Case Law As It Existed Prior To The Change In Regulatory Approach.**

Since the enactment of HOLA in 1933, and prior to the 1983 amendment to the regulations through the promulgation of 12 U.S.C. §§ 545.1 and 545.2, a vast body of reported case law was developed dealing with the preemptive effect on state law of HOLA and the HOLA regulations.

The seminal case on the subject — and a case strikingly parallel in material respects to the case at bar — is *People of State of Cal. v. Coast Fed. Sav. & Loan Ass'n,* 98 F.Supp. 311 (S.D. Cal. 1951). There, the People of the State of California and the then California Superintendent of Banks sought an injunction and the recovery of statutory penalties against a federal savings and loan association on the ground that it was engaged in false advertising and, in particular, that "through signs and other means of advertising, defendant [the federal association] has transacted business in the manner of a bank and has held itself out as a bank or savings bank, and has led the public to believe that it was such a

bank, without authority and in violation of state statutes." (98 F.Supp. 315.)

The District Court dismissed the action, determining that HOLA established a uniform national system of federal savings and loan associations, that the federal regulatory agency charged with responsibility for supervising them, the Bank Board, had prescribed its own regulation to control advertising practices of federal associations, and that therefore the state banking laws on the subject of advertising were inapplicable to federal savings and loan associations operating within the state:

> *"Not only does the act of Congress [HOLA] which authorized the creation, operations and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the [state] statute. . . . It seems clear that congress had preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association.* U.S. Constitution Art. VI, cl. 2 . . . . (98 F.supp. 318-20; emphasis added.)

*People v. Coast Fed. Sav. & Loan Ass'n. supra*, was followed by a plethora of other reported trial court and intermediate appellate court decisions, both state and federal, upholding the preemptive effect of HOLA and the HOLA regulations.

For example, in *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974), the plaintiffs brought an action in the state court against, *inter alia*, eight federally chartered savings and loan associations challenging under California state law the legality of provisions of their mortgage loan contracts authorizing them to assess charges in the event that the principal of a loan was repaid prior to maturity. After the action was removed, the federal District Court dismissed the action against the federally chartered associations on the ground that federal law had preempted the field, and the plaintiffs appealed. (499 F.2d 1146.) The Court of Appeals, after reviewing the doctrine of federal preemption, reaffirmed the holding of *People v.*

*Coast Fed. Sav. & Loan Ass'n, supra*, that federal law had preempted the regulation of federally chartered savings and loan associations by reason of the Bank Board's promulgation of comprehensive regulations covering all aspects of their operations. The Court affirmed the judgment of dismissal, explaining:

> *"Pursuant to its valid statutory authority, the Federal Home Loan Bank has promulgated comprehensive regulations covering all aspects of every federal savings and loan association 'from its cradle to its corporate grave'".* (499 F.2d 1146-47; emphasis added.)[7]

Eventually, the question of the preemptive effect of HOLA and the HOLA regulations was addressed in a landmark United States Supreme Court decision, *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982). In that case the Court was confronted with the questions of (a) whether a regulation of the Bank Board was intended to preempt state laws affecting the "due-on-sale" practices of federal associations; and (b) if it was so intended, whether the Bank Board acted within its statutory authority in effecting such preemption. After resolving the former issue in the affirmative, the Court turned to the latter issue and concluded that HOLA conferred upon the Bank Board

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[7]Accord: *Central Sav. & Loan Ass'n of Chariton, Iowa v. Federal Home Loan Bank Bd.*, 422 F.2d 504 (8th Cir. 1970); *North Arlington Nat. Bank v. Kearny Fed. Sav. & Loan Ass'n*, 187 F.2d 564 (3d Cir. 1951), *cert. denied*, 342 U.S. 816, 72 S.Ct. 30 (1951); *Glendale Fed. Sav. & Loan Ass'n v. Fox*, 459 F.Supp. 903, 904-12 (C.D. Cal. 1978); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F.Supp. 819 (N.D. Ill. 1975); *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F.Supp. 644 (E.D. Wis. 1975); *Elwert v. Pacific First Fed. Sav. & Loan Ass'n*, 138 F.Supp. 395 (D. Or. 1956); *Washington Fed. Sav. & Loan Ass'n v. Balaban*, 281 So.2d 15 (Fla.1973); *Springfield Inst. v. Worcester Fed. Sav. & Loan Ass'n*, 329 Mass. 184, 107 N.E.2d 315 (1952), *cert. denied*, 344 U.S. 884, 73 S.Ct.184 (1952). See also *First Fed. Sav. & Loan Ass'n of Boston v. State Tax Comm'n* 437 U.S. 255, 258 n.3, 98 S.Ct. 2333 (1978), in which the United States Supreme Court noted that " . . . the federal statute [HOLA] protects federal associations from being forced into the state regulatory mold."

plenary authority to regulate the operations of federal associations to the exclusion of state law. To quote the Court:

> *"The broad language of § 5(a) [of HOLA] expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans. As one court put it, '[i]t would have been difficult for Congress to give the Bank Board a broader mandate.'* . . .
>
> ". . . Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now,' and to 'establish them with the force of the government behind them, with a national charter.' . . . " (458 U.S. 161, 166-67; emphasis added.)

Since the aforedescribed decisions involved specific federal regulations, and since the basis for the Court of Appeal decision in the case at bar was the absence of a specific federal regulation, is the decision consistent with the aforedescribed decisions? Clearly it is not.

While the aforedescribed decisions involved specific federal regulations, they did so simply because when they were decided regulations such as 12 C.F.R. §§ 545.1 and 545.2 did not exist, and the Bank Board expressed its preemptive intent by promulgating regulations dealing with specific subjects. *In the absence of regulations such as 12 C.F.R. § 545.1 and § 545.2, the specific regulation was the source of expression of preemptive intent.* While some of the cases decided before these regulations were adopted speak of the need for a specific regulation to effect preemption, *they do so merely because in the absence of another source of expression of preemptive intent it was the specific regulation that provided such an expression.* Since, however, 12 C.F.R. § 545.1 and § 545.2 were adopted to substitute for that specific regulation as that source of expression of such a preemptive intent, those regulations now constitute that source. Hence, the Court of Appeal decision, insofar as it requires a specific regulation to effect preemption notwithstanding the existence of 12 C.F.R. § 545.1 and § 545.2, is clearly inconsistent with the

reported case law antedating the promulgation of those regulations.

**4. The Inconsistency Between The Decision Of The Court Of Appeal And Case Law That Has Developed Since The 1983 Change In Regulatory Approach.**

*De La Cuesta* was decided at a time when the Bank Board still regulated federal associations through the promulgation of specific regulations authorizing particular activities, *i.e.*, prior to the promulgation of 12 C.F.R. §§ 545.1 and 545.2. Since *De La Cuesta*, however, there have been a number of additional reported cases dealing with the preemptive effect on state laws affecting the operation of federal associations of HOLA and the HOLA regulations *as they are currently structured, including 12 C.F.R. §§ 545.1 and 545.2. These reported cases recognize that the current HOLA regulations extend to, and are intended to preempt, state laws affecting all aspects of the operation of federal associations.*

In *Federal Sav. & Loan Ins. Corp. v. Kidwell*, 716 F.Supp. 1315 (N.D. Cal. 1989) (vacated in a part not here relevant by *Eureka Federal Sav. & Loan Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991)), for example, the Federal Savings and Loan Insurance Corporation sued former officers of a federal savings and loan association for breach of fiduciary duty based on federal common law and for negligence and waste based upon California state law. The defendants moved for summary judgment with respect to the claims for negligence and waste on the ground of federal preemption.

The Court granted the motion, noting that although the state laws in question did not on their face purport to regulate lending practices of federal associations, *since their application could affect such practices* they constituted *de facto* regulation and thus were within the purview of the preempted field. To quote the opinion:

> "In May, 1983, the Federal Home Loan Bank Board ("FHLBB") issued 12 C.F.R. § 545.2 . . . *This exercise of the Board's authority is preemptive of any state law purport-*

*ing to address the subject of the operations of Federal associations.*

*"Given . . . § 545.2, it is clear that any state law 'purporting to address the subject of the operations' of a federal association is preempted by the FHLBB's regulations.* These regulations deal extensively with the lending practices of federal associations. *See* 12 C.F.R. §§ 545.31-53. The lending practices of defendants are at issue in this lawsuit.

"The question of decision, then, is whether the state laws of negligence and waste 'purport to address the subject of the operations' of a savings and loan. In other words, preemption hinges on whether the substantive laws of negligence and waste constitute regulation of the operations of an association, specifically regulation of the lending practices at issue here.

* * *

"On their face, the state laws of negligence and waste do not purport to regulate the lending practices of a savings and loan. *In the context of this case however, where negligence and waste are alleged regarding the lending practices of defendants, these state causes of action constitute de facto regulation because they can directly affect the conduct of bank operations. This is so because negligence and waste, like any substantive laws, are meant to encourage certain conduct and deter other conduct.*

*" 'The unique federal interest in uniform administration of federal savings and loans,' [citation] reveals that these state laws constitute regulations of association operations. This is apparent because the varying state laws of negligence and waste would permit or forbid different conduct in different states. This variance is at odds with Congress's goal of 'uniform treatment of federal saving and loan associations.' "*

"Accordingly, the Court finds that state law causes of action for negligence and waste are preempted by federal law." (716 F.Supp. 1316-17; emphasis added.)[8]

Similarly, in *Wisconsin League of Financial Inst. v. Galecki*, 707 F.Supp. 401 (W.D. Wis. 1989), a trade association representing federally chartered savings and loan associations brought an action against certain state officials seeking declaratory and injunctive relief to bar, on the ground that their application was preempted by federal law, the application to federal associations of state statutes regulating escrow accounts established for the purposes of paying real estate taxes and insurance on property hypothecated as security for loans. The trial court found in favor of the plaintiffs, holding that through its adoption of 12 C.F.R. §§ 545.1 and 545.2, the Bank Board exercised its authority to preempt any state laws affecting the operations of federal associations. The *Galecki* court stated:

"*. . . [T]he structure of the present regulations makes it apparent that the preemption expressing in §545.2 extends to all operations of federal savings institutions whether or not the regulations substantively regulate that aspect of the operations. . . .*

"The comments of the Federal Home Loan Bank Board at the time of the adoption of the rules render the Board's intent unambiguous.

"Current Part 545 is based upon the premise that the investment authority of the HOLA must be implemented expressly by regulation. Many of the provisions of the statute, however, do not require regulatory action.

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[8]The Opinion of the Court of Appeal states that because of "an unpublished decision [in which] the appellate court vacated the lower court decision in part without specifying which part was being vacated," the decision in *Federal Sav. & Loan Ins. Corp. v. Kidwell, supra*, "is without persuasive or precedential value." (Opinion, p. 17, fn. 10.) In fact, a copy of the unpublished opinion was lodged with the Court of Appeal in connection with the Petition for Rehearing, and it is apparent that *it does not in any way affect the portion of the Opinion here relevant.*

> In order to grant associations the maximum flexibility to exercise the authorities granted by the HOLA, the Board had determined to revise the general approach to regulating investment activities of federal associations. Accordingly, *Part 545 now addresses the authority of associations only to limit, interpret or recognize incidental authority. Federal associations may exercise all of the authority granted by HOLA subject only to limitations contained in the regulations.*

"48 Fed.Reg. 23,032 (1983).

> "Concerning preemption the Board stated that it 'desires to make clear its views on the preemptive nature of the authority conferred on federal associations by the HOLA and the Board's regulations.' " (707 F.Supp. 404-05.)

Since the aforementioned cases hold that 12 C.F.R. §§ 545.1 and 545.2 effect preemption with respect to matters as to which no specific regulations exist, those decisions and the Court of Appeal decision plainly are inconsistent.[9]

**B. Resolution By This Court Of The Preemption Question Presented Is Pragmatically Important.**

While the granting of certiorari is necessary to secure uniformity of decision with respect to the preemptive effect of HOLA and regulations promulgated thereunder, resolution of the preemption question presented is also pragmatically important for a variety of reasons.

First, the effect of the Court of Appeal decision is to abridge the rule making authority of the OTS.

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[9]The scope of the problem is dramatized by the fact that there are now three reported cases (including the instant case) in which 12 C.F.R. §§ 545.1 and 545.2 have been interpreted as not preempting federal law absent a specific federal regulation. They are *Siegel v. American Sav. and Loan Ass'n*, 210 Cal.App.3d 953 (1989) and *Livingston v. Vanguard Fed Sav. Bank*, 563 A.2d 175, 178 (Pa. Super. 1989).

In promulgating 12 C.F.R. §§ 545.1 and 545.2, a federal agency, now the OTS, determined to preempt state laws affecting the operations of federal associations through the promulgation of a single generic regulation rather than through the promulgation of a large body of regulations dealing with specific aspects of such operations. It may have done so because it wished to simplify and reduce the size of its body of regulations; or because it was concerned about the risk of leaving unintended interstices in the body of applicable regulations; or because it wanted to avoid the necessity to revise the regulations at frequent intervals; or for other reasons. Whatever its motivations may have been, the federal agency was entitled to — and did — elect the manner in which it would exercise its preemptive authority. The pragmatic effect of the Court of Appeal decision, however, is to abrogate the ability of the agency to make that election to preempt through the promulgation of generic regulations and, instead, compel it to promulgate a large body of specific regulations.[10]

Second, federal associations must continuously formulate and implement policies and procedures with respect to their operations, including their lending practices; and obviously it is essential to such formulation and implementation that they know whether these policies and procedures must conform to, or are exempt from, the operation of state law.[11] In the absence of a definitive resolution of that issue, federal associations are confronted with the necessity either of conforming to state law,

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[10]While the Court of Appeal decision is addressed to the conduct of one particular agency, the OTS, the precedential ramifications of the decision obviously extend to other federal agencies as well. If the OTS must promulgate specific rather than generic regulations in order to effect peremption of state law, why are other federal agencies not under a similar obligation. Thus the Court of Appeal decision has the effect of depriving federal agencies of an option with which they are invested under federal law.

[11]For example:

1. California Code of Civil Procedure § 2954.8 requires that financial institutions pay interest on impound accounts maintained for the payment of property taxes and other charges. Federal law imposes no such requirements.

thereby possibly frustrating federal policy, or not conforming to state law and running the risk that they will violate such law by doing so.[12]

Third, conformance of the practices of federal associations to state law may gratuitously impair the efficiency and even the soundness of the federal savings and loan system. For one thing, one of the basic objectives of the litigation out of which the instant proceeding arises is to impose upon federal associations special loan underwriting requirements for the financing of multi-family, inner-city buildings. The effect of doing so would be to increase the cost of operations of federal associations.[13]

Moreover, the Court of Appeal decision subjects federal associations to state laws imposing enormous potential liability. For example, in the action below the plaintiffs seek a civil penalty in the amount of $2,500 for each act of Highland constituting a violation of the state Unfair Competition Statute, Business and Professions Code §§ 17200, *et seq.*, but in no event less than $1,000,000; penalties in the amount of $1,000 for each day, or fraction thereof, that utility services were interupted; and other money damages, both compensatory and exemplary.[14]

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2. California Civil Code § 1812.30 creates several requirements governing the extension of credit on the basis of marital status, including specific credit application language not mandated under federal law.

[12]In fact, the Court of Appeal decision presents a strong incentive for federal associations gratuitously to conform their practices to state law, thereby frustrating the policy underlying HOLA of freeing federal associations from "the state regulatory mold". (See footnote 7, *supra.*)

[13]Alternatively, federal associations would have an incentive to simply refrain from lending on the security of inner city properties, with a concomitant adverse impact upon the availability of financing for such properties.

[14]While such monetary liabilities are of concern to the institutions themselves, they are also obviously of great concern to the Federal Deposit Insurance Corporation and the taxpaying public since, because of deposit insurance, the ultimate cost of such liability may be borne by them.

## C. Reasons For Deciding The Additional Issues Of Which Review Is Sought.

### 1. Requirements Under RICO For Pleading Injury.

In *Holmes v. Securities Investor Protection Corp., supra,* ____ U.S. ____, 112 S.Ct. 1311 (1992), this Court held that allegations that "but for" certain questioned conduct, the injury would not have occurred are insufficient to state a RICO claim, and that the injury must be "proximately" caused by the racketeering violation. The Court of Appeal's decision, however, failed to analyze the Highland defendant's conduct in accordance with the heightened standard articulated in *Holmes*, although the case was briefed to the Court of Appeal. Rather, the Court of Appeal held that the "injury suffered by each tenant plaintiff was the deprivation of a habitable dwelling and the loss of the money he or she had paid in rent, which was excessive because the dwellings were uninhabitable" and that "[s]uch injury flowed directly from the racketeering activity committed by defendants."

### 2. Requirements Under RICO For Pleading An "Enterprise".

In *United States v. Turkette, supra,* 452 U.S. 576, 583, 101 S.Ct. 2524 (1981), the U.S. Supreme Court held that an "association-in-fact enterprise" is "proved by evidence of an ongoing *organization*, formal or informal, and by evidence that the various associates function as a *continuing unit*," which entity must have an existence "separate and apart from the pattern of activity in which it engages." (486 U.S. at 583.) Consequently, courts evaluating the existence of an association-in-fact enterprise have examined the presence of a formal or informal organization functioning together as a "continuing unit," with an identifiable structure existing separate and apart from the activity of the group of associates.[15] In the instant case, however, the Court of Appeal,

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[15]Thus, for example, courts have recognized "association-in-fact" enterprises when the enterprise is an ongoing *unit* existing separate and apart from the alleged pattern of racketeering. (*See, e.g., Raymark Industries, Inc. v. Stempel,* 714 F.Supp. 460, 473 (D.Kan. 1988) (a group of doctors and lawyers operating under name of National Tire Workers Litigation Project was an association-in-fact enterprise engaged

essentially held that the complained of racketeering activity of the "associates" defined the "enterprise." In other words, in reversing the trial court, the Court of Appeal defined the alleged enterprises in terms of its complained of activities, so that, absent those activities, no "association-in-fact enterprise" between the Highland defendants and any of the alleged borrowers would have existed. The Court of Appeal thereby departed from the *Turkette* requirement that the association-in-fact enterprise have an existence separate and apart from the racketeering conduct.

## CONCLUSION

Certiorari should be granted to decide the question involving 12 U.S.C. § 1484(a) and 12 C.F.R. §§ 545.1 and 545.2; and, having granted certiorari, this Court should decide the RICO questions set forth above.

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Respectfully submitted,

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in making false asbestos claims against manufacturers); *United States v. Errico*, 635 F.2d 152, 155-56 (2d Cir. 1980), *cert. denied*, 453 U.S. 911, 101 S.Ct. 3142 (1981) (core circle of jockeys were associated together in fixed horse race betting scheme); *United States v. McLaurin*, 557 F.2d 1064, 1067-71, 78 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 743 (1978) (ongoing prostitution ring organized with "supervisors" constituted association-in-fact enterprise).)

# APPENDIX A

# APPENDIX A
# CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, clause 2 of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

12 U.S.C. § 1464(a):

In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director [of the Office of Thrift Supervision] is authorized, under such regulations as the Director may prescribe —

> (1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and
>
> (2) to issue charters therefor, giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit for housing safely and soundly."

12 C.F.R. §§ 545.1 and 545.2:

"§ 545.1 General authority.

> "A Federal savings association may exercise all authority granted it by the Home Owners' Loan Act of 1933 ("Act"), 12 U.S.C. 1464, as amended, and its charter and bylaws, whether or not implemented specifically by Office regulations, subject to the limitations and interpretations contained in this part.

"§ 545.2 Federal preemption.

"The regulations in this part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association."

18 U.S.C. § 1961:

"As used in this chapter —

(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to the tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering

paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to the use of interstate commerce facilities in the commission for murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union of group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred

within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) 'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) 'racketeering investigator' means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) 'racketeering investigation' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) 'documentary material' includes any book, paper, document, record, recording, or other material; and

(10) 'Attorney General' includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law."

# APPENDIX B

**NOT TO BE PUBLISHED**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, etc., *et al.*,

*Plaintiffs and Appellants,*

*v.*

HIGHLAND FEDERAL SAVINGS AND LOAN, etc., *et al.*,

*Defendants and Respondents.*

BO58411
(Super.Ct.No. C718828)

COURT OF APPEAL
SECOND DISTRICT

FILED
Jan. 26, 1993

JOSEPH A. LANE
Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Barnet M. Cooperman, Judge. Reversed and remanded.

James K. Hahn, City Attorney, Stephanie Sautner and Ronald Low, Deputy City Attorneys; Litt, Marquez & Fajardo, Barrett S. Litt and Ben Margolis for Plaintiffs and Appellants.

McKenna & Fitting, Michael D. Berk, Aaron M. Peck, Theresa A. Kristovich and Carl W. Sonne for Defendants and Respondents.

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Plaintiffs appeal from the judgment of dismissal following the sustaining without leave to amend demurrers to the second amended complaint of defendants Highland Federal Bank (Highland), Ben Karmelich (Karmelich), Selina Elizabeth Pratt (Pratt), and H.F.S. Corporation (HFS; collectively, the Highland defendants). The court found the complaint failed to state a cause of action for RICO violations, fraud or fraudulent concealment. The court further found the entire complaint, except the RICO cause of action was barred by federal preemption.

Because the trial court erred in finding no cause of action was stated and the doctrine of federal preemption barred the state claims, we reverse the judgment.

## FACTUAL STATEMENT

### 1. The Parties

Plaintiffs consist of the People of the State of California (People) and numerous individuals, in their individual capacity and as guardians ad litem and on behalf of a class who resided in one or more of the subject slum Los Angeles City buildings (tenant plaintiffs).[1] The defendants who are parties to this appeal

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[1]The original individual plaintiffs are: Josefina Sepulveda; Margarita Espinoza; Margarita Bonilla; Raul Cruz Amaya; Jova Corea; Rosa Estela Nevares; Jose Santos Nevares; Rosa Cordova: Maria B. Mergar; Raudel Flores; Haydee Alcantara; Angel Edgardo Flores; Ana Arellano; Jose Roberto Reyes; Concepcion Reyes; Gloria Escobar; Silvia Escobar; Eddy Sanchez; Trinidad Garcia; Ramon Rojas; Josefina Rivera; Manuel Rivera; Salvador Rivera; Leticia Ruiz; Concepcion Garcia; Roman Campos; Ramon Campos; Daisy Villalobos; Maria Rojas; Gregorio Rojas; Amalia Mendoza; Manuel Gil; Maria De La Luz Almaraz; Guadalupe Barragan; Luz Ines Ruiz; Amalia Delgado; Jorge Florez; and Rafael Valtierra; individually, and on behalf of a class composed of all present tenants or residents of the following buildings, all located in the City of Los Angeles: 4020 South San Pedro Street; 5426 Virginia Avenue; 823 South Bonnie Brae Street; 807 South Fedora Avenue; 504 South Bonnie Brae Street; 533 Ceres Avenue; 1000 Echo Park Avenue; 1616 West 11th Street; 526 South Union Avenue; and 2616 Idell Street, and of all persons who were tenants and/or residents of said buildings at material times; Maria De Jesus Rodriguez, Betty Rodriguez, Guadalupe Ibarra, and Esiquio Rodriguez, Minors, by their guardian ad litem Josefina Sepulveda; Javier Espinoza, George Michael Espinoza, Yesenia Raquel Espinoza, and Daniel Alejandro Bonilla, Tricia Bonilla, Minors, by their guardian ad litem Margarita Espinoza; Alexander Corea Amaya, a Minor, by his guardian ad litem Raul Cruz Amaya; Juan Jose Nevares and Carlos F. Nevares, Minors, by their guardian ad litem Rosa Estela Nevares; Yovani Velasquez, Jose Velasquez, Yessica Mergar, Minors, by their guardian ad litem Maria B. Mergar; Indira Alcantara, a Minor, by her guardian ad litem Haydee Alcantara; Mayra Arellano;

are Highland, Karmelich (its president), Pratt (its loan coordinator and vice-president), and HFS (its wholly owned subsidiary).

Highland, a federally chartered savings and loan institution, specializes in making loans to owners of residential properties including slum buildings in the greater Los Angeles area. Eight of the eleven slum properties listed in this complaint were financed by defendant Highland. Karmelich is both its president and chief executive officer. Karmelich also served as secretary of the board of directors of defendant Northeast. Pratt is a vice-president and loan coordinator for defendant Highland. Pratt helped Highland facilitate the rapid transfer of record ownership of slum buildings. She was also actively engaged in soliciting and arranging for uncreditworthy borrowers to assume Highland loans on those slum buildings without regard to the borrowers' ability to maintain and repair the buildings. HFS is a California corporation and a wholly owned subsidiary of defendant Highland. Among its activities is the servicing of loans made by defendant Highland.[2]

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Antonio Arellano; Steve Arellano; Eduardo Arellano and Cindy Arellano, Minors, by their guardian ad litem Ana Arellano; Patricia Reyes, Minor, by her guardian ad litem Jose Roberto Reyes; Karen Rojas, Maria Garcia, Raul Garcia, Minors, by their guardian ad litem.

On February 6, 1991, the court dismissed plaintiffs Silvia Escobar, Eddie Sanchez, Ana Arellano, and Guadalupe Barragan in their individual capacity for failing to comply with a prior discovery order.

[2]These facts are alleged in the second amended complaint. All well-pleaded allegations of the complaint are deemed to be true for the purpose of appellate review of a ruling on a demurrer. *(Shoemaker* v. *Meyers* (1990) 52 Cal.3d.

These defendants are sometimes collectively referred to as the "Highland defendants." A number of other defendants were named in plaintiffs' second amended complaint. However, these remaining defendants are not parties to this appeal. They consist of other lenders, which are not savings associations, and individuals, including some who at one time or another were owners of the subject 11 buildings. The action remains pending as to these defendants.

2. Nature of Charging Allegations

In this action plaintiffs seek to hold the Highland defendants responsible for the continuing slum conditions of certain buildings. In addition to monetary damages and penalties the complaint seeks injunctive relief.[3]

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[3]Plaintiffs seek to enjoin the Highland defendants from, inter alia:

"(a) Soliciting, engaging or permitting individuals to act as straw buyers or record owners who, in fact, have no genuine ownership interest in the substandard property;

"(b) Recording or causing to be recorded any document containing the name of any record owner who is not the true owner of the substandard property, the legal obligor on the deed of trust, or the party whose assets were relied upon in creating the encumbrance;

"(c) Accepting, notarizing, causing to be notarized, or recording or causing to be recorded any documents that are a part of any financing arrangement concerning any substandard property, which document has been executed by a person other than the person whose name appears on the document;

"(d) Failing to send a copy of the notice set forth in sub-paragraph (g) below to each unit in the substandard property, in both English and Spanish, upon recordation of a trust deed to the potential borrower secured on the subject property;

"(e) Recording or causing to be recorded a trust deed secured by substandard property without first providing a copy of the trust deed, title report, and written proof of compliance with sub-paragraph (d) above to the following interested agencies: [¶] (i) Office of Thrift Supervision (OTS); [¶] (ii) The Housing Enforcement Division of the Lcs Angeles City Attorney's office; [¶] (iii) The Legal Aid Foundation of Los Angeles;

"(f) Selling or assigning Highland's beneficial interest in any note secured by substandard property without first providing to the purchaser or assignee a copy of the trust deed, the recorded substandard order, and the notice described in sub-paragraph (g) below; and without providing notice of such sale to the agencies listed in sub-paragraph (e) above.

"(g) Failing to give written notice to any potential borrower or anyone seeking to assume a note, previously issued by Highland, on substandard property of which the lender has notice by reason of recorded notice or otherwise concerning the potential legal consequences

The thrust of the complaint charges Highland with engaging in unfair business practices and fraud for the purpose of maximizing its profits. Such goal was achieved by creating a situation where rents, which were collectable only if the units complied with the habitability laws, were generated without the expenditure of sums necessary to ensure such compliance. Thus, the slum nature of the buildings were perpetuated and the tenant plaintiffs were defrauded of their right to a habitable dwelling.

Essentially, Highland allegedly committed such illegal activities through fraudulent loan transactions in order to avoid criminal and civil liability. Highland hid and exercised its control over the subject buildings by setting up record owners who had only token or no investment in the buildings, i.e., either such owners had insufficient asserts or lacked bona fide business qualifications to obtain the loans. In general, title to the buildings was worthless since the amount of the loans exceeded the fair market value of

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attached to ownership of said property. Said written notice shall include: [¶] (i) An advisement that the subject property or building has been declared substandard; [¶] (ii) That the borrower or person assuming the note and taking title to the property may be held criminally responsible if he or she fails to correct the substandard conditions; [¶] (iii) That the amount of rent a tenant owes may be subject to reduction by virtue of the uninhabitable conditions; [¶] (iv) That tenants may have a cause of action for damages with respect to the conditions in the building, and for injunctive relief requiring repair of said buildings forthwith; [¶] (v) That potential rent increases may be denied pursuant to the Los Angeles City Rent Stabilization Ordinance if the Substandard Notice is not lifted; [¶] (vi) That if borrower or person assuming the note fails to undertake the necessary repairs within a reasonable time (120 days), the lender will petition the court for the appointment of a receiver to collect the rents and make repairs, pursuant to waste provisions of its deed of trust; [¶] (vii) That under California law a borrower may not be able to claim state tax deductions for the interest payments and depreciation on said property until the Substandard Notice is removed.

"(h) Declining to initiate and complete foreclosure as speedily as the law permits on substandard property of which the lender has notice if the substandard conditions are not fully corrected within 120 days, provided that foreclosure proceedings may terminate if correction occurs before foreclosure is completed . . . ."

the security. The record owners therefore were strawmen who were basically managers of the buildings for Highland's benefit.

It is further alleged that Highland in effect was the true beneficial owner of the buildings because it determined who would be the record owner and when the owner failed to perform, Highland replaced him or her with another whom its could control. Such transfers of record ownership also served to complicate and frustrate civil and criminal prosecution for violation of the habitability law.

It was also alleged that Highland routinely facilitated the title transfer of the buildings without the exercise of due-on-sale clauses of the loan agreements, without requiring loan assumption by creditworthy individuals, and without scrutiny to ensure necessary repairs were made. Highland charged loan points and interest at a rate higher than those for bona fide loan transactions and utilized the entire or almost entire loan amount from the new record owner to pay off the principal, interest, penalties and arrearages owed by the former record holder. Such loans were often arranged by lender-related defendants controlled by and/or associated with Highland. Highland then allowed or caused the fraudulent documents to be recorded in order to hide their control.

Finally, it was alleged the above pattern of activity by Highland was outside of and inconsistent with the normal and standard practice of lenders.

## PROCEDURAL STATEMENT

This action was filed on March 28, 1989. On June 7, 1990, a second amended complaint asserting numerous causes of action was filed, including those for RICO violations, fraud and fraudulent concealment.[4]

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[4]That complaint set forth, respectively, these causes of action:

(1) Unfair business practices (Bus. & Prof. Code, § 17200) (first cause of action by the People against all defendants);

(2) Violation of 18 U.S.C. §§ 1961-1968 (RICO) (causes of action 81-161 by all plaintiffs against Highland, Karmelich, Pratt,

On August 6, 1990, Highland defendants filed demurrers to that complaint. They also filed a companion motion to strike. On or about October 19, 1990, plaintiffs filed joint opposition. On or about November 13, 1990, Highland defendants filed their reply.

On January 25, 1991, the court sustained certain demurrers without leave to amend. The court sustained demurrers without leave to amend as to all causes of action, except the second for

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inter alia, but not HFS). Former causes of action 2 through 80 and 81 in the first amended complaint were not realleged in the second amended complaint. There are no causes of action 2 through 80 in the second amended complaint;

(3) Injunctive relief (causes of action 162-242 by all plaintiffs against all defendants);

(4) Breach of warranty of habitability regarding written contract (causes of action 243-323 by all tenant plaintiffs against all defendants);

(5) Breach of warranty of habitability regarding oral contract (causes of action 324-404 by all tenant plaintiffs against all defendants);

(6) Nuisance (causes of action 405-485 by all tenant plaintiffs against all defendants);

(7) Negligence (causes of action 486-566 by all tenant plaintiffs against all defendants);

(8) Strict liability regarding maintenance of slum premises (causes of action 562-647 by all tenant plaintiffs against all defendants);

(9) Intentional infliction of emotional distress (causes of action 648-728 by all tenant plaintiffs against all defendants);

(10) Violation of Civil Code section 1942.4 (causes of action 729-809 by all tenant plaintiffs against all defendants;

(11) Fraud (causes of action 810 through 890 by all tenant plaintiffs against all defendants);

(12) Fraudulent concealment (Civ. Code, § 1710(3)) by all tenant plaintiffs against all defendants); and

(13) Violation of Civil Code section 789.3 (interruption of utility services) (causes of action 972-1,052 by all tenant plaintiffs against all defendants).

For the purpose of this appeal the enumerated groups of causes of actions in (2) through (13) above are referred to as causes of action 2 through 13, respectively.

RICO violations on the ground of failure to state a cause of action (Code Civ. Proc., § 430.10, subd. (e)) because of federal preemption. As authority it relied on section 545.2 of title 12 of the Code of Federal Regulations; *Fidelity Federal Savings and Loan v. De La Cuesta* (1982) 458 U.S. 141, 162; *Wisconsin League of Financial Institutions v. Galecki* (W.D.Wis. 1989) 707 F.Supp. 401, 405.)

The court further sustained demurrers without leave to amend on the ground of failure to state a cause of action (Code Civ. Proc., § 430.10, subd. (e)) specifically as to the second cause of action (RICO), the 11th cause of action for fraud, and the 12th cause of action for fraudulent concealment. The court also sustained uncertainty demurrers to the entirety of the complaint with leave to amend. (Code Civ. Proc., § 430.10, subd. (f).) The motion to strike was placed off calendar.

On March 15, 1991, the court entered the order (judgment) of dismissal based on the sustaining of the demurrers of the Highland defendants without leave to amend.

## ISSUES PRESENTED

This appeal presents three basic issues: (1) Are the state claims against Highland, a federal savings and loan association, preempted by federal law? (2) If so, does federal preemption also bar the action against Karmelich, Highland's president, Pratt, its loan coordinator and a vice-president, and HFS, its wholly-owned subsidiary? (3) Does the complaint state a cause of action against the Highland defendants for RICO violations, fraud, or fraudulent concealment?

## DISCUSSION

1. Action Against Highland Not Barred by Federal Preemption

a. Federal Preemption under HOLA[5]

(1) Principles Applicable to Determination of Preemption

"Preemption issues are resolved through the process of statutory interpretation. [Citation.] We look to the language of the statute and to the intent of Congress." (*Siegel* v. *American Savings & Loan Assn.* (1989) 210 Cal.App.3d 953, 959.)

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[5]The Highland defendants concede the trial court's ruling based on federal preemption was grounded only on HOLA and its concomitant regulations. Nonetheless, they urge us to uphold that ruling on the additional grounds of federal preemption based on the Federal Fair Housing Act of 1986 (12 U.S.C. § 3601 et seq.) and The Community Reinvestment Act (12 U.S.C. § 2903 et seq.). They assert: " 'If right upon any theory of the law applicable to the case, [a ruling] must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" *(D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

We have no quarrel with their recitation of law except to find it inapposite since defendants have failed to establish the applicability of those Acts to the issues before this court. We observe the above two Acts were briefly mentioned at footnote 30 of their demurrer memorandum, and thus, were technically before the trial court.

On appeal they devote several pages to quotations from the Fair Housing Act in their brief but fail to cogently connect the Act's requirements with the matters at issue, which are mentioned in some detail in only footnote 19. Similarly, the Highland defendants quote at length from The Community Reinvestment Act but set forth no cognizable connection between its provisions and the subject issues.

Based on the above we reject their position as unsupported. It is well established that as an appellate court we are not required to consider matters urged in the briefs where no pertinent argument is made in support thereof. (See, e.g., *Strutt* v. *Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873.)

" 'In determining whether a state statute [or a state cause of action] is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. . . . . First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Second, congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. . . . . [¶] As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Nevertheless, pre-emption is not to be lightly presumed.' (*California Federal S. & L. Assn.* v. *Guerra* (1987) 479 U.S. 272, 280-281 [93 L.Ed.2d 613, 623, 107 S.Ct. 683], citations omitted.) In *R. J. Reynolds Tobacco Co.* v. *Durham County* (1986) 479 U.S. 130, 149 [93 L.Ed.2d 449, 467, 107 S.Ct. 499], the court stated: 'Although the regulations are not themselves controlling on the pre-emption issue, where, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute, as part of the pre-emption analysis we must consider whether the regulations evidence a desire to occupy a field completely. Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive.' [Citations omitted.]" (*Id.* at 958-959.)

(2) No Express Preemption Under HOLA Except as to Two Items

HOLA is the acronym of the "Home Owners' Loan Act" (12 U.S.C. §1461 et seq.).[6] "The language of HOLA, as well as the history that lies behind its enactment, demonstrate that there is a

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[6]All statutory references are to title 12 of the United States Code unless otherwise specified.

strong federal interest in the uniform treatment of the federally chartered savings and loans associations. Congress initially enacted HOLA and its regulatory structure in response to a crisis in the nation's private home financing system. [Citation.] This crisis had developed at least in part as a result of the inconsistent and ill-advised practices of the various states. As noted by the Ninth Circuit, "the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that [the Bank Board's] rules would set an example for uniform and sound savings and loan regulations.[7] *(Conference of Federal Savings & Loan Ass'ns v. Stein,* 604 F.2d 1256, 1258, (9th Cir. 1979), *summarily affd.,* 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980), *citing* T. Marvell, *The Federal Home Loan Bank Board* at 26 (1969).' *(Eureka Federal Sav. and Loan Ass'n* v. *Kidwell* (N.D.Cal. 1987) 672 F.Supp. 436, 439.)" *(Siegel, supra,* at p. 959.)

Part 545 of title 12 of the Code of Federal Regulations (12 C.F.R.) sets forth the regulations covering the operations of a federal association. Section 545.1, which specifies the general parameters of the association's authority, provides: "A Federal savings association may exercise all authority granted it by [HOLA] and its charter and bylaws, whether or not implemented specifically by Office regulations, subject to the limitations and interpretations contained in this part."

Section 545.2 provides: "The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association." *(Ibid.)*

In their brief the Highland defendants urge the import of the above two regulations is preemption of any state law which would

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[7]The Board was replaced in 1989 with the Office of Thrift Supervision (OTS) and its Director. (12 U.S.C. §§1462(1) & (3), 1462a(e).)

limit or penalize the conduct of a federal association where such conduct is authorized by HOLA and not proscribed by HOLA regulations since such law would thus be in direct conflict with HOLA.[8]

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[8]In a footnote of their brief the Highland defendants urge "[t]here is even a direct conflict between certain specific HOLA regulations and the state law upon which the subject state law claims are predicated."

Specifically, they refer only to two regulations. The first, 12 C.F.R. section 545.32(d) authorizes an association to make a real estate loan up to 100% of the market value of the secured property. They claim a direct conflict exists because plaintiffs seek to proscribe loans where the borrower would have no equity in the property, and thus, vesting "control" in Highland. We find no conflict. Defendants have mischaracterized certain language in the complaint. When viewed in context, it is clear plaintiffs were not alleging defendants should be prohibited from making loans up to 100% of the market value of the property.

The complaint alleged, "The premises involved were security for indebtedness amounting to approximately 100% or more of their value, and additional loans on the property were not available in any bona fide business transaction." It was further alleged defendants "with full knowledge of the slum character of these buildings, has made or aided in the making of loans for amounts exceeding the value of the slum buildings at high interest rates and 'points', requiring payments to the lending defendant which absorbed all or virtually all of the rental flow from the buildings . . . Each . . . defendant reaped financial benefits from the slum buildings' continuing slum character." In context, the thrust of these allegations is merely to explain one reason why the slum condition of the property was perpetuated, namely, since no equity was left no additional loans were available to fix up the property.

The Highland defendants lastly claim a direct conflict exists between the state claims and section 545.34, which permits an association to incorporate into a mortgage loan contract " 'a provision . . . whereby the Federal association *may, at its option,* declare immediately due and payable' the secured indebtedness upon an unconsented to transfer of title to the real property." They argue plaintiffs seek to "deprive Highland of the *option* to exercise such provision and, instead, compel it to do so." (Emphasis in original.) In support, they point to the allegations in the complaint that defendants improperly made frequent transfers of the property from "one uncreditworthy and disreputable

As authority for their claim of preemption the Highland defendants argue "the seminal case on the subject, and a case strikingly parallel in material respects to this case, is *People* v. *Coast Fed. Sav. & Loan Ass'n* (S.D. Cal. 1951) 98 F.Supp. 311."[9]

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borrower to another without exercise of due-on-sale clauses of loan agreements, without requiring loan assumption by creditworthy individuals, and without scrutiny to determine or insure that payments would be made and that the slum buildings would be maintained in accordance with requirements of the law. By making frequent transfers of ownership of the slum buildings, each such defendant's conduct facilitated the ability of the involved record owner to avoid criminal liability for violations of the law . . . [and] each such defendant further effectively avoided or delayed repair of the slum buildings."

We find no conflict in this regard. By such allegations plaintiffs do not seek to deprive defendants of their option to exercise the due-on-sale clauses. Instead, plaintiffs merely seek to preclude defendants from conducting sham transfers of the property. (But see Discussion, *post,* regarding a direct conflict as to paragraph (3)(h) of the prayer for injunctive relief.)

[9]As further support, they cite *Meyers* v. *Beverly Hills Fed. Sav. Loan Ass'n* (9th Cir. 1974) 499 F.2d 1145 (prepayment penalties); *Greenwald* v. *First Fed. Sav. Loan Ass'n of Boston* (D. Mass. 1978) 446 F.Supp. 620 (interest payments on escrow accounts); *First Fed. Sav. & Loan Ass'n of Boston* v. *Greenwald* (1st Cir. 1979) 591 F.2d 417 (interest payments on escrow accounts); *City Fed. Sav. & Loan Ass'n* v. *Crowley* (E.D. Wis. 1975) 393 F.Supp. 644 (self-dealing of association officers and directors in violation of Board's regulations); *Lyons Sav. & Loan Ass'n* v. *Federal Home Loan Bank Board* (N.D. Ill. 1974) 377 F.Supp. 11 (branching of association); *Kaski* v. *First Fed. Sav. & Loan Ass'n of Madison* (1976) 72 Wis.2d 132 [240 N.W.2d 367] (interest rate escalation clauses in mortgage note); *Central Sav. & Loan Ass'n of Chariton* v. *Federal Home Loan Bank Bd.* (8th Cir. 1970) 422 F.2d 504 (mobile associations); *Murphy* v. *Colonial Fed. Sav. & Loan Ass'n* (2d Cir. 1967) 388 F.2d 609 (list of eligible voters re association director election); *North Arlington Nat'l Bank* v. *Kearny Fed. Sav. Loan Ass'n* (3d Cir. 1951) 187 F.2d 564, *cert. den.*, 342 U.S. 816 (branches); *Glendale Fed. Sav. Loan Ass'n* v. *Fox* (C.D. Cal. 1978) 459 F.Supp. 903, 904-912 (due-on-sale clause); *Retti* v. *Arlington Heights Fed. Sav. & Loan Ass'n* (N.D. Ill. 1975) 405 F.Supp. 819 (authority of association to sell insurance and internal obligations of directors); *Elwert* v. *Pacific*

They also rely heavily on *Fidelity Fed. Sav. &Loan Ass'n* v. *De La Cuesta* (1982) 458 U.S. 141 and *Wisconsin League of Financial Inst.* v. *Galecki* (W.D. Wis. 1989) 707 F.Supp. 401.[10]

Contrary to their assertion otherwise, *People* v. *Coast Fed. Sav. & Loan Ass'n, supra,* is not "a case strikingly parallel in material respects to this case." In Coast [t]he gravamen of the complaint is that through signs and other means of advertising, defendant [federal association] has transacted business in the manner of a bank and has held itself out as a bank or savings bank, and has led the public to believe that it was such a bank, without authority and in violation of state statutes." (*Id.* at p. 315.) Former section 161.7(e) of title 24 of the C.F.R. expressly governed the subject of advertising vis-a-vis federal associations. (*Id.* 315 at fn. 5.) In view of such regulation the court held the Board had primary jurisdiction over the subject matter. (*Id.* at p. 317.)

In contrast, this case does not involve a direct conflict between a specific regulation and state law. Reliance by the Highland defendants on *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*

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*First Fed. Sav. & Loan Ass'n* (D. Or. 1956) 138 F.Supp. 395 (branches); *Washington Fed. Sav. & Loan Ass'n* v. *Balaban* (Fla. 1973) 281 So.2d 15 (branches); *Springfield Inst.* v. *Worcester Fed. Sav. & Loan Ass'n* (1952) 329 Mass. 184 [107 N.E.2d 315], *cert. den.*, 344 U.S. 884 (branches).

Such reliance is patently misplaced. Those cases involved either a direct conflict between state law and specific regulations under HOLA or issues concerning the internal management and direct operation of the federal association itself, and thus, are factually inapposite.

[10]The Highland defendants cite *Federal Sav. & Loan Ins. Corp.* v. *Kidwell* (N.D. Cal. 1989) 716 F.Supp. 1315, for the proposition that state law claims for negligence and waste against the federal association were preempted by federal law. Their reliance on that case is unfounded. In addition to the preemption issue the district court also ruled the claim for breach of fiduciary duty under federal common law was governed by a four-year state statute of limitations. In an unpublished decision the appellate court vacated the lower court decision in part without specifying which part was being vacated. (*Eureka Federal Sav. & Loan Ass'n* v. *Kidwell* (9th Cir. 1991) 937 F.2d 612.) Accordingly, the district court decision is without persuasive or precedential value.

and *Wisconsin League of Financial Inst. v. Galecki* is misplaced for that same reason.

In *De La Cuesta* the United States Supreme Court held the Board's regulation on due-on-sale clauses preempted state law as embodied in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943. (*Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, supra*, 458 U.S. 141, at p. 159.) The *De La Cuesta* court reasoned:

> [T]he Board's intent to pre-empt the *Wellenkamp* doctrine is unambiguous. The due-on-sale regulation plainly provides that a federal savings and loan 'continues to have the power' to include a due-on-sale clause in a loan instrument and to enforce that clause 'at its option.' 12 CFR § 545.8-3(f) (1982). The California courts, in contrast, have limited a federal association's right to exercise a due-on-sale provision to those cases where the lender can demonstrate that the transfer has impaired its security. [¶] The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. . . . In addition, *Wellenkamp* explicitly bars a federal savings and loan from exercising a due-on-sale clause to adjust a long-term mortgage's interest rate toward current market rates — a due-on-sale practice the Board has approved. . . . (*Id.* at pp. 155-156, emphasis in original.)

In *Wisconsin League of Financial Inst. v. Galecki, supra*, the court held the "Board has expressly preempted state regulation in the area of mortgage escrow accounts and loan disclosures." (707 F.Supp. at p. 405.) The court expressly limited its holding the facts of that case by announcing: "The court need not determine the full breadth of the term 'operations of a federal Association' [as provided in section 545.2] because there can be no dispute that such phrase extends at least to the regulation of mortgage escrow accounts and mortgage loan disclosures. *Fidelity Federal*,

458 U.S. at 167 . . . *Kaski v. First Federal Savings & Loan Association*, 72 Wis.2d 132, 240 N.W.2d 367 (1976).[11] (*Ibid.*)

It is undisputed that this case involves neither the regulation by state law of advertising, enforceability of due-on-sale clauses, or mortgage escrow accounts and mortgage loan disclosures. Accordingly, the *Coast, De La Cuesta*, and *Galecki* cases are of no moment with regard to whether the subject state causes of action are expressly preempted by HOLA and its concomitant regulations.

"Preemption of state law by federal regulation is not favored. We will not find express preemption unless a regulation clearly so states. (*Chicago & N. W. Tr. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 317 [67 L.Ed.2d 258, 265, 101 S.Ct. 1124].) It is the burden of the party claiming preemption to prove it. (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548 [208 Cal.Rptr. 874, 691 P.2d 630]; *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 937 [216 Cal.Rptr. 345, 702 P.2d 503].)" (*Siegel v. American Savings & Loan Assn., supra*, 210 Cal.App.3d at p. 960.)

As pointed out in *Siegel*, "[t]he Board is capable of saying it means to expressly preempt all state law in an area. . . . Section 545.2 contains no such statement that federal law is preemptive of all state common law claims."(*Id.*, at pp. 960-961.)

Similarly, we have found no provision of HOLA nor any particular regulation, and none have been cited to us, which expressly preempt the statutory action by the People for unfair business practices and the causes of action by the tenant plaintiffs for fraud, RICO violations, etc. We therefore hold the subject

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[11]In addition to direct preemption the *Galecki* court also found implicit preemption based on the finding state regulation of escrow accounts would be "a direct obstacle" to "the Board's express purpose to permit the parties to negotiate terms of an escrow agreement between themselves without intervention by substantive law." (*Wisconsin League of Financial Institutions v. Galecki, supra*, 707 F.Supp. at p. 406.) In contrast, the state claims at issue here do not present "a direct obstacle" to any announced OTS policy.

action is not explicitly barred by federal preemption pursuant to HOLA.[12]

Nonetheless, we do find federal preemption with regard to two matters. First, the allegation that Highland charged loan "points and provided for interest, each of which was higher than the rates for bona fide loan[ ] transactions" impinges on the specific intent of Congress to preempt state usury laws,[13] and thus, improperly delves into an area expressly preempted by HOLA. (See, e.g., 12 U.S.C. § 1463(g).)

The second matter concerns item (3)(h) of the complaint's prayer which seeks to enjoin the Highland fendants from "[d]eclining to initiate and complete foreclosure as speedily as the law permits on substandard property of which the lender has notice if the substandard conditions are not fully corrected within 120 days, provided that foreclosure proceedings may terminate if correction occurs before foreclosure is completed." This re-

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[12]At oral argument the Highland defendants conceded no espress statutory preemption exists here.

[13]Section 1463(g) as to preemption of state usury laws, provides:

"(1) Notwithstanding any State law, a savings association may charge interest on any extension of credit at a rate of not more than 1 percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district in which such savings association is located or at the rate allowed by the laws of the State in which such savings association is located, whichever is greater.

"(2) If the rate prescribed in paragraph (1) exceeds the rate such savings association would be permitted to charge in the absence of this subsection, the receiving or charging a greater rate of interest than that prescribed by paragraph (1), when knowingly done, shall be deemed a forfeiture of the entire interest which the extension of credit carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commenced in a court of appropriate jurisdiction not later than 2 years after the date of such payment, an amount equal to twice the amount of the interest paid from the savings association taking or receiving such interest."

quested relief is in direct conflict with 12 C.F.R. section 545.34 which permits a federal association at its option [to] declare immediately due and payable the secured indebtedness upon an unconsented to transfer of title to the real property.

On remand, the court is therefore directed to strike such allegations and prayer requests. (Code Civ. Proc., § 436.)

(3) No Implied Preemption Under HOLA.

Alternatively, the Highland defendants assert the subject action is barred by the doctrine of implied preemption. They urge federal law has impliedly "occupied the field" of federal savings and loan associations with regard to their operations and functions.

We acknowledge HOLA and the regulations promulgated thereunder have created both a comprehensive and uniform thrift system which is federally regulated and that in exercising its broad authority the former Board has issued specific, detailed regulations governing those associations. Nonetheless, we observe the United States Supreme Court has declined to conclude the Board has preempted all lending practices or that the Board's discretion is limitless.

In *De La Cuesta* the court construed the Board's powers to be plenary over federal associations: "The broad language of § 5(a) [of HOLA] expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans . . . [Thus,] '[i]t would have been difficult for Congress to give the Bank Board a broader mandate.' [Citation.]" (*Fidelity Federal Savings and Loan* v. *De La Cuesta, supra*, 458 U.S. at p. 161.)

However, the court expressly declined to find the Board had preempted state law as to all lending practices and cautioned: "Because we find an actual conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation." (*De La Cuesta*, at p. 159, fn. 14.) The court went on to qualify its holding in that case as follows: "Although the Board's power to promulgate regulations exempting federal savings and loans from the requirements of state law

may not be boundless, in this case we need not explore the outer limits of the Board's discretion."[14] (*Id.* at p. 167.)

Moreover, "[c]omprehensiveness of federal regulation alone, is not sufficient to establish implied preemption. Again, the United States Supreme Court has said: 'We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption on whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.' (*Hillsborough County* v. *Automated Medical Labs.* (1985) 471 U.S. 707, 717 [85 L.Ed.2d 714, 724, 105 S.Ct. 2371].) Our task is to determine whether the field which has been preempted by federal regulation is broad enough to cover plaintiffs' state causes of action. (*Siegel, supra*, 210 Cal.App.3d 953, 961-962.)

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[14]Justice O'Connor wrote separately "to emphasize that the authority of the . . . Board to pre-empt state laws is not limitless . . . Nothing in the language of § 5(a) of HOLA, which empowers the Board to 'provide for the organization, incorporation, examination, operation, and regulation' of federally chartered savings and loans, remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices." (*Id.* at pp. 171-172; *ante* omitted.)

In his dissent, joined by Justice Stevens, Justice Rehnquist reasoned: "In § 545.8-3(f), the Board has gone beyond regulating how, when, and in what manner a federal savings loan may lend mortgage money . . . In this case, the Board is not regulating the operation of federal savings and loan associations, but the operation of due-on-sale clauses. Without a congressional authorization more explicit than that relied upon by the Court, I conclude that the Board has entered a domain in which it is not authorized to override state laws . . . Discharge of its mission to ensure the soundness of federal savings and loans does not authorize the . . . Board to intrude into the domain of state property and contract law that Congress has left to the States." (*Id.* at pp. 174-175.)

We conclude it does not. The cause of action for unfair business practices as alleged by the People does not directly affect the operations of Highland, and therefore, is not covered by the subject regulations. Similarly, the regulations promulgated under HOLA do not pertain to racketeering charges under a RICO action. The remaining causes of action, e.g., nuisance, breach of warranty of habitability, intentional infliction of emotional distress, fraud, and interruptions of utilities would, at most, only incidentally and remotely touch upon the operations of Highland in its capacity as a federal savings association. Thus, those also do not impinge on the ambit of HOLA.

No implied preemption is found where the impact on the subject is merely indirect. (See, e.g., *English* v. *General Electric Co.* (1990) 496 U.S. 72.) In *English*, the court held the emotional distress claims of a whistle blower were not preempted by the federal government's exclusive authority to regulate the safety of nuclear power because such claims only indirectly affected the issue of nuclear safety. "Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." (*Id.* at p. 85.) The court reasoned: "For example, if an employer were to retaliate against a nuclear whistle-blower by hiring thugs to assault the employee on the job (conduct literally covered by § 210 [of the Energy Reorganization Act of 1972]), respondent's position would imply that the state criminal law prohibiting such conduct is within the pre-empted field. We simply cannot believe that Congress intended that result." (*Id.* at p. 83; see also, pp. 75-76.)

Also, where the subject matter is an area traditionally regulated by the states, no federal preemption is implied unless there is a clear and manifest intent shown. Thus, there must be "a showing of implicit pre-emption of the whole field . . . strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." (*Hillsborough County* v. *Automated Medical Labs., supra*, (1985) 471 U.S. 707, 716; see also, *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware* (1973) 414 U.S. 117, 139-140 [no preemption by the Security Exchange Act of 1934 of action for

profit sharing rights of terminated employee since California has strong policy of protecting wage earners].)

Moreover, "merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress [it does] not mean that States and localities [are] barred from identifying additional needs or imposing further requirements in the field." (*Hillsborough County* v. *Automated Medical Labs, Inc., supra*, 471 U.S. at p. 717.)

Accordingly, we determine whether the subject state causes of action are impliedly barred by federal preemption by scrutinizing them to see if they directly are "purporting to address the subject of the operations" of Highland, a federal savings association. (See, 12 C.F.R. § 545.2.)

The state causes of action at issue are grounded in Highland's wrongful course of conduct which enables slum conditions in the subject buildings to be perpetuated to the detriment of the health, safety and welfare of the People of California and, in particular, the tenant plaintiffs. The essence of those causes of action concerns the right of the state to prohibit, and punish Highland for its part in, the conspiracy to maintain dwellings in an uninhabitable condition.

From our review of HOLA and its concomitant regulations we have found no statutory provision nor regulation which even purports to address the subject of minimum housing standards. Also, any impact or intrusion on the "operations" of Highland is minimal and indirect.

Additionally, we conclude neither the intent of Congress in enacting HOLA nor the purpose of HOLA would be served by finding preemption under these circumstances. The paramount purpose of HOLA is to ensure the solvency of federal associations. (See, e.g., 12 U.S.C. §1463(a)(1)-(3), and §1464(d)(2).) That purpose would not be hindered, directly or indirectly, by the prosecution of the subject state claims. This is not the situation where the state seeks to regulate the conduct of all federal associations in California. Rather, the state merely seeks to protect its own interest in public safety and welfare against the

wrongful conduct of an entity, inter alia, which just happens to be a federal association.

(4) Action Against Karmelich, Pratt, and HFS Not Barred by Federal Preemption Under HOLA

Since this action is not preempted under HOLA as to Highland, a fortiori no preemption bars the action against Karmelich, its president and chief executive officer, or Pratt, its loan coordinator and vice president. Moreover, the action is also not preempted against HFS, which is Highland's wholly owned subsidiary but not a federal savings association.

3. Causes of Action Stated Against Highland Defendants for RICO Violations, and Fraud, But Not Fraudulent Concealment

a. RICO Action Properly Pleaded as to Mail Fraud

To state a cause of action under RICO (18 U.S.C. § 1961 et. seq.) a plaintiff must plead facts to show: (1) conduct (2) of an enterprise (3) through a pattern [and] (4) of racketeering activity." (*Sedima, S.P.R.L.* v. *Imrex Co.* (1985) 473 U.S. 479, 496, fn. omitted.) In their demurrer, the Highland defendants attack the above "enterprise" and "racketeering activity" components.

(1) Existence of RICO Enterprise Pleaded

The Highland defendants argue plaintiffs have failed to plead the existence and identity of an "enterprise," i.e., a group of defendants associated in fact for a common purpose although not a legal entity. We disagree.

An "enterprise" includes "any union or group of individuals associated in fact although not a legal entity."(18 U.S.C. § 1961(4).)

The existence of an enterprise is an essential element of a RICO claim. "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. . . . [It] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." (*United*

*States* v. *Turkette* (1981) 452 U.S. 576, 583; see also, *Shaffer v. Williams* (5th Cir. 1986) 794 F.2d 1030, 1032.)

The facts setting forth the existence and identity of the requisite enterprise are not alleged at a single location. Instead, such facts, because of the complexity of the scheme involved, are necessarily gleaned from various portions of the subject complaint.

At paragraph 150 of the complaint it was alleged: "The following associations constitute an enterprise within the meaning of RICO generally and 18 U.S.C. § 1961(4) specifically:

"a. The association in fact of defendants Highland, Northeast, and HFS (the Highland Enterprise).

" . . . . . .

"c. The association in fact of defendants Karmelich, Highland, Northeast, HFS, Leyton, Interreal, Interwest, PHC, and Fitzpatrick (the Highland-Leyton-Fitzpatrick Enterprise).

Although subparagraph a of paragraph 150 refers to Highland, Northeast, and HFS, as "the Highland Enterprises" it is clear such enterprise is but a component of the "enterprise" which comprises this element of a RICO action. Similarly, the reference to "the Highland-Leyton-Fitzpatrick Enterprise" in subparagraph d of paragraph 150 is to the component of the "enterprise" consisting of the members of the Highland Enterprise, defendants Leyton, Interreal, Interwest, PHC and Fitzpatrick. From a review of the factual allegations concerning these components of such "enterprise" it is clear the requisite facts concerning the existence of an informal ongoing organization consisting of a group of entities associated together for a common purpose of engaging in a course of conduct and functioning as a continuing unit has been alleged.

The complaint essentially alleges the above defendants engaged in a continuing scheme to defraud the tenant plaintiffs by secretly manipulating the record owner defendants and by actively assisting such owners to perpetuate the buildings in an uninhabitable condition in violation of the law. That the Highland, HFS and Northeast defendants were ongoing business entities which had

an ongoing relationship with each other independent of that fraud scheme is shown by the following facts: It was alleged Highland was a federal savings and loan association specializing in loans on residential property; Northeast, an investment corporation located at Highland's offices, was engaged in the business of handling insurance; and HFS, a wholly owned subsidiary of Highland, serviced loans made by Highland. The complaint further alleged that the association of defendant Highland, Northeast and HFS constituted an association in fact within the meaning of RICO. The above factual allegations thus evidence an interlocking independent business relationship among those three entities.

Moreover, it was also alleged that defendants Interreal, Interwest and PHC, all of which were entities which defendant Leyton had an interest, along with the above Highland entities and the individual defendants, Karmelich, as the secretary of Northeast's board of directors, Leyton and Fitzpatrick constituted an association of fact, and thus, an enterprise. The specifics of such association are set forth in the complaint and demonstrate an ongoing series of business transactions among these various defendants with regard to each of the subject buildings. (See, e.g., *Temple University* v. *Salla Bros., Inc.* (E.D.Pa 1986) 656 F.Supp. 97, 102 [sufficient ongoing organization shown]; cf. *Calcasieu Marine Nat. Bank* v. *Grant* (5th Cir. 1991) 943 F.2d 1453, 1461-1463 [no ongoing association shown]; *Martin* v. *Brown* (W.D.Pa. 1990) 758 F.Supp. 313, 322 [insufficient ongoing unit shown]; *Uniroyal Goodrich Tire Co.* v. *Mutual Trading Corp.* (N.D.Ill. 1990) 749 F.Supp. 369, 876-877 [insufficient "association-in-fact" shown].)

(2) "Racketeering Activity" Based on Mail Fraud Properly Pleaded

"Racketeering activity" under RICO consists of certain specific acts which are expressly enumerated in title 18 of the United States Code section 1961. The activity underlying the subject RICO claim is mail fraud and wire fraud. "In pleading a violation of the mail fraud statute (18 U.S.C. § 1341) [or the wire fraud statute (18 U.S.C. § 1342)] as a predicate act under a RICO scheme, plaintiffs must allege that (1) defendants devised a scheme or artifice to defraud, (2) defendants used the mails [or

wires] in furtherance of the scheme, and (3) defendants did so with the specific intent to deceive or defraud. [Citation.]" (*McMartin* v. *Children's Institute International* (1989) 212 Cal.App.3d 1393, 1407; accord, *Schreiber Distributing* v. *Serv-Well Furniture Co.* (9th Cir. 1986) 806 F.2d 1393, 1399-1400 [mail and wire fraud]; see also, *United States* v. *Gordon* (5th Cir. 1986) 780 F.2d 1165, 1171 [wire fraud].)

The Highland defendants also challenge the allegations of mailing and wire fraud as inadequate. They argue plaintiffs are required to but have failed to "specifically plead the time, place or nature of the alleged communications constituting racketeering activity. [Citation.]" (*McMartin* v. *Children's Institute Int'l, supra*, 212 Cal.App.3d at p. 1407; see also, *Alan Neuman Productions, Inc.* v. *Albright* (9th Cir. 1988) 862 F.2d 1388, 1392; *Rosenthal* v. *Vogt* (1991) 229 Cal.App.3d 69, 77.)

We agree the allegation of "wire fraud" is totally deficient in the above regard. Subparagraph e of paragraph 151 merely alleges: "Interstate telephone conversations relating to the slum buildings with lenders, persons attempting to locate various of the defendants, the Federal Home Loan Bank Board, and others." No facts are alleged to show the nature of such conversations or the place and time thereof. Accordingly, since plaintiffs have failed to show how such defects would be remedied if leave to amend were granted, we conclude the trial court was correct in impliedly finding the predicate act of "wire fraud" was inadequate to support a RICO action. (See, e.g., *Goodman* v. *Kennedy* (1976) 18 Cal.3d 335, 349.) The court is thus directed to strike subparagraph e of paragraph 151. (Code Civ. Proc., § 436.)

We further conclude, however, the court erred in sustaining the demurrer to that cause of action since the plaintiffs have adequately pleaded facts to support the predicate act of "mail fraud." The specific factual allegations of the mailings in the subject complaint are both qualitatively and quantitatively superior to the bare conclusionary allegation found to be inadequate in *Schreiber Distributing Co.* v. *Serv-Wall Furniture Co., supra*, 806 F.2d 1393. In *Schreiber*, the sole allegation was "on two or more occasions [defendants used] the United States mail . . . for the purpose of executing or attempting to execute the aforesaid

fraudulent scheme . . . ." (*Id.* at p. 1401; cf. also, *Alan Neuman Productions. Inc.* v. *Albright, supra*, 862 F.2d 1388, 1393, "The allegation of [the] complaint concerning predicate acts of fraud are similarly general referring to 'many acts of mail fraud,' 'many acts of wire fraud,' and 'many victims.' "

In contrast, the complaint here described the nature of the mailings as consisting "of [the] documents, deeds, deeds of trust and similar matters relating to the slum buildings." They were further delineated as the mailings were described as "[m]ailing of rent checks, mortgage and loan payments, payment for services rendered, and similar commercial transactions relating to slum buildings." The mailings of various materials were also described as relating to Code violations regarding slum buildings. Moreover, the place of mailing was reflected in the allegation of "[m]ailing of materials to various governmental entities, and recordation of real estate documents requested by mail and directed to the Los Angeles County Recorder. Every recorded document pertaining to the real estate transactions described in this complaint was sent through the mails to the County Recorder in furtherance of their conspiracy."

The intent to defraud element was supplied through the allegations concerning their effort to achieve the fraudulent objectives. Additional facts as to the time, place, and content of the fraud are set forth with particularity at paragraphs 87 through 98 of the complaint.

The allegations of the subject complaint as to time, place, etc., sufficiently comport with the requirement of pleading fraud with particularity. As one court explained: "Plaintiffs cannot be expected to specify the exact time and particular place of each factual omission and misrepresentation. The complaint adequately specifies the transactions and the approximate time frame, the contents of the alleged misrepresentations and the essence of omitted information, and the identities of those involved." (*Onesti* v. *Thomson McKinnon Securities, Inc.* (D.C.Ill. 1985) 619 F.Supp. 1262, 1265.)

As to other specific dates and details, we point out such matters are properly addressed during discovery, not on demurrer. Also,

when a particular document or matter was mailed is within the peculiar knowledge of the defendants. (See, e.g., *Committee on Children's Television, Inc.* v. *General Foods Corp.* (1983) 35 Cal.3d 197, 214, 217.)

(3) Nexus Between Racketeering Activity and Injury Pleaded

The Highland defendants next attack plaintiffs' RICO claim on the ground no facts are alleged to show any direct injury to the tenant plaintiffs as the proximate result of the racketeering activity. (*Sedima, S.P.R.L.* v. *Imrex Co., supra*, 473 U.S. 479, 496; *McMartin* v. *Children's Institute, supra*, 212 Cal.App.3d at p. 1407.)

We reject their contention as meritless. The injury suffered by each tenant plaintiff was the deprivation of a habitable dwelling and the loss of the money he or she had paid in rent, which was excessive because the dwellings were uninhabitable. Such injury flowed directly from the racketeering activity committed by defendants.

(4) Violation of 18 U.S.C. Section 1962,Subdivision (d) Pleaded

In a related argument defendants assert the lack of a legally cognizable injury flowing from the racketeering activity also demonstrates the failure of plaintiffs to allege a violation of title 18 of the United States section 1962, subsection (d).[15] (See *Medallion TV Enterprise* v. *SelecTV of California* (C.D.Cal. 1986) 627 F.Supp. 1290, 1297-1301.)

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[15]Subsection (d) of section 1962 provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

The relevant subsection is (c), which provides in pertinent part: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

We disagree. As discussed, above, the requisite injury was properly alleged, and thus, defendants' assertion is untenable.

b. Cause of Action Stated for Fraud

The Highland defendants contend no cause of action for fraud is stated because there are insufficient facts alleged to " 'show how, when, where, to whom, and by what means the [mis]representations were tendered.' *Stansfield* v. *Starkey* (1990) 220 Cal.App.3d 59, 73, . . . quoting *Hills Transp. Co.* v. *Southwest Forest Indus., Inc.* (1968) 266 Cal.App.2d 702, 707 . . . ." They complain "the People and the tenants [plaintiffs] allege . . . 'each record owner', without any further identification or limitation, made the allegedly fraudulent representations; that they were made to 'plaintiffs', without any further identification; and that they were made 'at the time of each respective record owner's ownership', without any further limitation as to time. The complaint is silent as to how the alleged representations were communicated." They contend the "above allegations are, of course, calculated to avoid communicating meaningful information about the alleged fraud either to the Highland defendants or to the Court. . . ." (*Ibid.*)

Defendant's contentions are meritless. The complaint sets forth with ample particularity the identities of the record holders, the identities and capacities of the many plaintiffs, and the time frame in which the representations were made. We acknowledge the allegations of fraud lack the specific detailed minutia desired by the Highland defendants. Those details, however, are properly the subject of discovery, not demurrer. The magnitude of the fraudulent scheme alleged and the number of plaintiffs involved invoke the analogy to the fact situation in *Committee on Children's Television, Inc.* v. *General Foods Corp.*, *supra*, 35 Cal.3d 197, 214.

In that case, the court rejected a lack of specificity argument based on the following reasoning, which we find instructive here: "Plaintiffs allege that defendants carried out a large scale program of deceptive advertising in which the specific advertisements change constantly, but all follow a pattern of making, in one form or another, certain misleading and deceptive representations. If

such is the case, to require plaintiffs to plead the specifics of each advertisement would render a suit challenging the overall program impractical. The complaint would have to include thousands of pages setting out specifics which are largely within defendants' knowledge. The cost and difficulty of compiling, organizing, and setting down the information would seriously deter the filing of such complaint. The effect of such a pleading requirement, moreover, would not be limited to discouraging private suits; it would also seriously hamper suits by public officials seeking to enjoin schemes of unfair competition and deceptive advertising." (*Ibid.*)

c. No Fraudulent Concealment Cause of Action Stated

Defendants claim no cause of action is stated for fraudulent concealment for two reasons: (1) the Highland defendants were under no legal duty to disclose the concealed facts at issue; and (2) in any event, the cause of action erroneously assumes someone who lends money on the security of real property may, by virtue of that activity, assume the obligations of ownership. They point out unless the defendant is under a duty to disclose, concealment of a fact is not actionable. (Civ. Code, §1710, subd. (3).) Defendants argue there is no duty to disclose here because section 1692 of the Civil Code does not require the disclosure of the name and address of the owner of certain real property. Such a requirement, accordingly to defendants, is based on the assumption "that Section 1962 imposes on an owner of real property a duty to disclose his or her name and address *even when the name and address of an agent for the owner, such as a property manager, is disclosed.* That assumption is fallacious."

They further argue "someone that lends money on the security of, but does not have possession and control of, real property may [not], by virtue of that activity, become the 'beneficial' or 'responsible' owner of such property and thereby assume the obligations of ownership [and thus, the duty to disclose under section 1692] to [the] tenants."

We agree no cause of action for fraudulent concealment is stated but not for the reasons given by defendants. The thrust of this cause of action is to compel the beneficial owners to disclose

such beneficial ownership to the tenant plaintiffs to enable the latter to seek "civil relief or governmental enforcement of the law from the responsible non-record owner defendants." Plaintiffs concede as much in their reply brief: "If the tenants had known that the one in control of the property was a bank, they would be far more likely to bring an action to have the property repaired than they would were the owner a person having substantially no assets."

A plain reading of section 1962 of the Civil Code[16] reveals its disclosure provisions do not give rise to a duty to disclose the

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[16]Civil Code section 1962 provides:

"(a) Any owner of a dwelling structure specified in Section 1961 or a party signing a rental agreement or lease on behalf of the owner shall disclose therein the name and usual street address at which personal service may be effected of each person who is:

"(1) Authorized to manage the premises.

"(2) An owner of the premises or who is authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for all notices and demands.

"(b) In the case of an oral rental agreement the owner or a person acting on behalf of the owner for the receipt of rent or otherwise, on written demands, shall furnish the tenant with a written statement containing the information required by subdivision (a).

"(c) The information required by this section shall be kept current and this section shall extend to and be enforceable against any successor owner or manager, who shall comply with this section within 15 days of succeeding the previous owner or manager.

"(d) A party who enters into a rental agreement on behalf of the owner who fails to comply with this section is deemed an agent of each person who is an owner:

"(1) For the purpose of service of process and receiving and receipting for notices and demands.

"(2) For the purpose of performing the obligations of the owner under law and under the rental agreement.

"(e) Nothing in this section limits or excludes the liability of any undisclosed owner."

name and address of a beneficial owner. All that is required under section 1962 is the disclosure of "the name and usual street address at which personal service may be effected of each person who is: (1) Authorized to manage the premises[; and] (2) An owner of the premises or who is authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for all notices and demands." (Civ. Code, § 1962.) The reference to "[a]n owner of the premises" is to the record owner, not the beneficial owner. This is clear from the language of subdivision (e) of section 1962, which provides: "Nothing in this section limits or excludes the liability of any undisclosed owner."

## DISPOSITION

The judgment is reversed with directions to the court (1) to strike the allegation that Highland charged "points and provided for interest, each of which was higher than the rates for bona fide loans transactions"; (2) to strike prayer item (3)(h); (3) to strike subparagraph (e) of paragraph 151 of the second amended complaint; and (4) to conduct further proceedings consistent with the views expressed herein. The plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED

CROSKEY, J.

We concur:

KLEIN, P.J.

HINZ, J.

# APPENDIX C

C

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 DATE: 02/25/93

Mc Kenna & Fitting
Michael D. Berk
444 South Flower Street
9th Floor
Los Angeles, CA. 90071

RE: The People of the State of California
vs.
Highland Federal Savings & Loan Assoc.
2 Civil B058411
Los Angeles NO. C718828

THE COURT:

Petition for rehearing denied.

# APPENDIX D

D

Second Appellate District, Division Three,
No. B058411 S031448

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

---

THE PEOPLE ETC. Et Al., *Appellants*

v.

HIGHLAND FEDERAL SAVINGS AND LOAN ETC. Et Al.,
*Respondents*

---

**Petition for review DENIED.**

On the recommendation of the Court of Appeal pursuant to rule 978 of the California Rules of Court, the Reporter of Decisions is directed to publish the opinion in the above-entitled appeal in the Official Reports. See subdivision (c) of rule 978, California Rules of Court.

---

Chief Justice

# APPENDIX E

E

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION:3

ROGERS & WELLS
MICHAEL D. BERK
444 S. Flower St.
9th Floor
Suite
Los Angeles, CA 90071

RE: The People of the State of California
vs.
Highland Federal Savings & Loan Assoc.
2 Civil B058411
Los Angeles NO. C718828

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 01/26/93 is now final.

* * Reversed & Remanded To Trial Court W/Directions. * *

Appellants To Recover Costs.

JOSEPH A. LANE, Clerk

By: M. Gavinski June 8, 1993

Deputy Clerk

AUG 20 1993
OFFICE OF THE CLERK

No. 93-212

In The

# Supreme Court of the United States

October Term, 1993

HIGHLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, H.F.S. CORPORATION, BEN KARMELICH AND SELINA ELIZABETH ("BETTY") PRATT,

*Petitioners,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, BY THE CITY OF LOS ANGELES, ET AL.,

*Respondents.*

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

## MOTION OF SAVINGS & COMMUNITY BANKERS OF AMERICA AND CALIFORNIA LEAGUE OF SAVINGS INSTITUTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WENDY SAMUEL
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OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

The Savings and Community Bankers of America ("SCBA") and the California League of Savings Institutions ("Cal League") hereby move the Court for leave to file the attached "Brief of Amici Curiae In Support Of Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District". The consent of Petitioner Highland Federal Savings and Loan Association to the filing of such brief has been obtained. The consent of the Respondents has been requested but refused.

## I.

## INTEREST OF AMICI CURIAE

The SCBA is the national trade association for savings institutions and its membership includes most of the savings institutions doing business in the United States. The Cal League is the California trade association for savings institutions and its membership includes most of the savings institutions doing business in California. The majority of the members of both the SCBA and the Cal League are federally chartered.

The SCBA and Cal League are interested in the preemptive effect upon state law of the Home Owners' Loan Act, 12 U.S.C. § 1461, *et seq.* ("HOLA") and regulations promulgated under HOLA. They (or their predecessors) were *amici curiae* in cases dealing with such preemption, including what is today the leading case on the subject, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982).

## II.

## ISSUES ADDRESSED BY AMICI

The issues addressed by the SCBA and Cal League are as follows:

1. The uncertainty which the Court of Appeal decision has engendered concerning the preemptive effect of HOLA and regulations promulgated under HOLA;

2. The deleterious effect of the Court of Appeal decision upon the "dual banking" system contemplated by HOLA; and

3. The impact of the Court of Appeal decision upon the integrity of the regulatory process.

Accordingly, the SCBA and Cal League request that leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted,

WENDY SAMUEL
Counsel of Record

*Attorney for Savings & Community Bankers of America and California League of Savings Institutions*

No. 93-212

In The

# Supreme Court of the United States

October Term, 1993

HIGHLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, H.F.S. CORPORATION, BEN KARMELICH AND SELINA ELIZABETH ("BETTY") PRATT,

*Petitioners,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, BY THE CITY OF LOS ANGELES, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District**

## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## I.

## STATEMENT OF INTEREST

### A. Savings & Community Bankers Of America

The Savings & Community Bankers of America ("SCBA") is the national trade association for the American savings industry. Its membership includes most of the savings associations and savings banks in the United States, including ninety that are headquartered in California. The majority of the members of the SCBA, both in California and elsewhere, are federally chartered.

The SCBA provides various services to its members including, among other things, technical assistance, educational products and programs, publications, and meetings. One of the objectives of the aforedescribed services is to assist members in complying with the requirements of federal and state law and regulations. From time to time the SCBA participates, in the capacity of an *amicus curiae*, in litigation involving issues of interest to its members.

The SCBA and its membership are naturally concerned about legal developments which generate uncertainty as to whether particular activities of savings associations are governed by federal or state law. Accordingly, the SCBA and its members – particularly those that are federally chartered – are profoundly interested in the preemptive effect of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461, *et seq.*, and regulations promulgated under HOLA upon the application of state law to the operations of federal associations.

A predecessor of the SCBA, the United States League of Savings Institutions, was an *amicus curiae* in a landmark decision on the subject of federal preemption under HOLA, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982).

**B. California League Of Savings Institutions.**

The California League of Savings Institutions ("Cal League") is a trade association composed of most of the more than one hundred savings institutions operating in California. The vast majority of such institutions, as measured by deposits, are federally chartered. Accordingly, the Cal League is vitally interested in legal developments affecting the operations of federally chartered savings institutions in California.

From time to time, the Cal League participates, in the capacity of an *amicus curiae*, in litigation involving issues that are of concern to its members. The Cal League was an *amicus curiae* in *Fidelity Federal Savings & Loan Association v. de la Cuesta, supra.*

## II.

## SUMMARY OF ARGUMENT

Certiorari should be granted for the following reasons:

1. It is necessary to resolve the uncertainty which the decision of the Court of Appeal has engendered as to the preemptive effect of HOLA and regulations promulgated under HOLA.

2. The Court of Appeal decision undermines the "dual banking" system contemplated by HOLA in that it tends to subject federally chartered institutions to state regulation.

3. The Court of Appeal decision is a threat to the regulatory process in that it fails to give effect to the plain meaning of two federal regulations, 12 C.F.R. §§ 545.1 and 545.2.

## III.

## ARGUMENT

### A. The Granting Of Certiorari Is Necessary To Resolve The Uncertainty Which The Decision Of The Court Of Appeal Has Engendered.

Prior to the subject Court of Appeal decision, the preemptive effect of HOLA and the HOLA regulations appeared to be well established. There was a large body of case law which had developed upholding the preemptive effect of HOLA and regulations promulgated under HOLA. This Court, in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982), had held that HOLA and regulations promulgated under HOLA preempted state law. In addition, the federal agency responsible for administering HOLA, now the Office of Thrift Supervision ("OTS"), promulgated regulations, 12 C.F.R. §§ 545.1 and 545.2, which clearly expressed an intent to permit federal associations to do whatever federal law permitted without being bound by state law limitations.

While the Court of Appeal decision pays lip service to the preexisting case law including this Court's decision in *de la Cuesta*, the Court of Appeal decision undermines that case law by refusing to give effect to the plain meaning of 12 C.F.R. §§ 545.1 and 545.2. Thus the Court of Appeal decision effectively flouts the decision of a myriad of courts including the decision of this Court in *de la Cuesta*.

The concerns of *amici* are very practical. Every federal association must establish policies and procedures governing its activities. In the case of most federal associations, presumably the propriety of these policies and procedures was predicated on the assumption that federal law and regulations governed. The decision of the Court of Appeal, however, challenges the correctness of that assumption. As a result, federal associations have been plunged into a legal limbo with regard to the law which governs their operations. That legal limbo could be highly disruptive and detrimental to federal associations, to their customers, and to the integrity of the system of federal savings institutions as a whole.

### B. The Court Of Appeal Decision Undermines The "Dual Banking" System Contemplated By HOLA.

HOLA contemplates a "dual banking" system in which there are parallel systems of savings institutions. One is a system of state chartered institutions governed by state law (except insofar as federal insurance regulations apply), and the other is a system of federally chartered institutions governed, to the extent determined by

the OTS, by federal law. Indeed, a stated objective of Congress in enacting HOLA was to have a system of savings institutions that would operate in accordance with the "best practices of local mutual thrift and home-financing institutions in the United States." (12 U.S.C. § 1464(a)).

Overall, the "dual banking" system of parallel state chartered savings institutions and federally chartered savings institutions has worked well. It has permitted opportunities for innovation at the state level while permitting a pattern of leadership by federal institutions.

The Court of Appeal decision, however, undermines the "dual banking" system contemplated by HOLA. It provides a mechanism for subverting the principle of federal regulation of federal institutions and subjecting all savings institutions – both state chartered and federally chartered – to the whims of state regulation.

### C. The Court Of Appeal Decision Is A Threat To The Integrity Of The Regulatory Process.

An essential premise of the regulatory process is that courts will endeavor to interpret and apply regulations in the manner contemplated by their promulgators. Otherwise the regulatory process becomes a sham in which the real decision making authority is vested not in the regulatory agencies but, rather, in the judiciary.

In the case of 12 C.F.R. §§ 545.1 and 545.2 certainly the intent that federal law preempt the application of state law to federal associations is apparent. In refusing to give effect to that intent, the Court of Appeal decision

undermines the integrity of the regulatory process, both as to the OTS and as to regulatory agencies generally.

## IV.

## CONCLUSION

The Court of Appeal decision has dire implications for the doctrine of federal preemption under HOLA as it has evolved over the years and as articulated by this Court in *de la Cuesta*. For that reason, the SCBA and Cal League believe that certiorari should be granted.

Respectfully submitted,

WENDY SAMUEL
Counsel of Record

*Attorney for Savings & Community Bankers of America and California League of Savings Institutions*